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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

VOL. VI.

CONTAINING CASES IN 1847 AND 1848.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

HON. STEVENSON ARCHER, Chief Judge—died on the 26th June, 1848.
HON. THOMAS BEALE DORSEY, Commissioned Chief Judge, vice ARCHER, deceased, 3d July, 1848.
HON. E. F. CHAMBERS, Judge.
HON. ARA SPENCE, Judge.
HON. ALEXANDER C. MAGRUDER, Judge.
HON. ROBERT N. MARTIN, Judge.
HON. WILLIAM FRICK, Judge, vice ARCHER, C. J. deceased.

OF THE COURT OF CHANCERY.

HON. JOHN JOHNSON, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles* and *Prince George's* Counties.

HON. ALEXANDER C. MAGRUDER, Chief Judge.
HON. EDMUND KEY, Associate Judge.
HON. P. W. CRAIN, Do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne* and *Talbot* Counties.

HON. E. F. CHAMBERS, Chief Judge.
HON. PHILEMON B. HOPPER, Associate Judge.
HON. JOHN B. ECCLESTON, Do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery* and *Carroll* Counties, and *Howard* District.

HON. THOMAS BEALE DORSEY, Chief Judge.
HON. THOMAS H. WILKINSON, Associate Judge.
HON. NICHOLAS BREWER, Do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset* and *Worcester* Counties.

HON. ARA SPENCE, Chief Judge.
HON. WILLIAM TINGLE, Associate Judge.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington* and *Allegany* Counties.

HON. ROBERT N. MARTIN, Chief Judge.
HON. RICHARD H. MARSHALL, Associate Judge.
HON. THOMAS BUCHANAN, Do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.

HON. STEVENSON ARCHER, Chief Judge.
HON. WILLIAM FRICK, Chief Judge, vice ARCHER, deceased.
HON. JOHN PURVIANCE, Associate Judge.
HON. JOHN C. LE GRAND, Do.

OF BALTIMORE CITY COURT.

HON. NICHOLAS BRICE, Chief Judge.
HON. ALEXANDER NISBET, Associate Judge.
HON. W. G. D. WORTHINGTON, Do.

ATTORNEY GENERAL.

GEORGE R. RICHARDSON, ESQUIRE.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

DECEMBER TERM, 1847.

CORNELIUS BURCKMYER AND E. L. ADAMS *vs.* DAVID WHITEFORD.—*December*, 1847.

C. drew a bill of exchange on *B.* payable ninety days after date, endorsed by *W.* in blank. It was negotiated with *P.* who endorsed it specially to *D.* On presentation for acceptance, it was refused, protested, and returned by *D.* to *P.* when the latter erased his special endorsement, and re-transmitted the bill to *D.* who sued *W.* upon his endorsement. The defendant, in support of his defence, had proved by *P.* the erasure of his endorsement; and the plaintiff then proposed to ask him to state the reasons which induced him to strike it out. This the County Court refused to sanction. *Held*, there was no good reason for the refusal, unless it be that the fact of the erasure, as proved by the defendant, could not prejudice the plaintiffs. If it had been of any importance to know why the erasure had been made, it must have been reasonable to permit the witness to state when, why, and under what circumstances, it was made.

Upon the return of a bill of exchange, drawn at *Baltimore*, upon a house at *Charleston, S. C.* protested for non-acceptance, which had been endorsed generally by the payee, the holder in *Baltimore* struck out his special endorsement, and by letter transmitted it to the plaintiffs, residents in *Charleston*, and claimed the amount of the bill from them, informing them it had been charged to their account, and he expected a credit for it. *Held*, that in an action by the house at *Charleston*, against the payee and endorser of the bill, this letter, in connection with parol proof in the cause, was evidence to show the right of the plaintiffs to institute the action.

This letter was evidence as a part of what passed between the holder of the bill and the house at *C.* in relation to its transfer to them. It is a part of the *res gesta* of the surrounding and cotemporaneous circumstances of the transaction.

The admissibility in evidence, of the surrounding circumstances of a case, is to be determined by the court, according to the degree of their relation to the principal fact in controversy, and in the exercise of its sound discretion.

In a case where the plaintiff's right to sue upon a bill of exchange was denied, he may prove its delivery to counsel, and the fact of his counsel's possession, for the purpose of the suit, when the action was commenced.

Where the attorney of the plaintiff is in possession of a bill of exchange at the time of the action brought, the presumption is that he is rightfully in possession.

When the day on which notice of protest ought to have been given, is Sunday, it is sufficient to serve it on the next day.

APPEAL from *Baltimore* County Court.

This cause was before the court at December term, 1843, and is reported in 1 *Gill*, 127. It was an action of assumpsit brought on the 9th October, 1840, by the present appellants against the present appellee.

The bill of exchange on which the action was founded is as follows:

Baltimore, 1*st January*, 1840.

$1,500. W. B.

Ninety days after date please pay to the order of *David Whiteford*, fifteen hundred dollars, which charge, as advised, to account of Your ob't serv't,

NICHOLAS U. CHAFEE.

To Messrs. *Blum & Cobia*, merchants, *Charleston*, *S. C.*

Endorsed—*D. Whiteford.* Pay to the order of Messrs. *C. Burckmyer & Co.* TH. PHENIX.

The protest of this bill for non-acceptance was dated 6th January, 1840. The answer to the notary was "we decline accepting for want of advice." The notices of protest were certified to have been enclosed by the notary to *Th. Phenix*, cashier *Western Bank of Baltimore.*

1ST EXCEPTION.—At the trial of this cause, the plaintiffs read in evidence the bill of exchange, and proved the sig-

nature of *N. U. C.* the drawer, and of the defendant, as endorser, by the name of *D. Whiteford;* the protest of the bill; and the affidavit of the notary public who made the protest, viz.

"Personally appeared on this 16th day of July, 1841, before me, *Henry Morris*, N. P. duly commissioned and sworn, *A. C. Smith*, N. P. and made oath that he did, on the 6th of January, 1840, protest a draft for non-acceptance drawn by *N. U. C.* on *B. & C.* endorsed by *D. W.* for $1,500. The said draft was dated 1st January, 1840, at 90 days, protested by order of *Messrs. C. Burckmyer & Co.* The said *A. C. S.* further testifies that he forwarded a written notice addressed to *N. U. C.* drawer, and also a written notice addressed to *D. W.* endorser, informing them of the protest of said draft, and that the holders thereof looked to them for the payment of the same, by mail, under cover to *Tho. Phenix, Esq.* cashier of the *W. Bank, B.* and which were placed in the post office here on the 6th January, 1840, the date of protest.

A. C. SMITH, *Notary Public.*

Witness my hand and seal at *Charleston* the day and year above written. HENRY MORRIS, *Notary Public.*"

The plaintiffs then proved that by the course of the mail in January, 1840, letters mailed in *Charleston, S. C.* on 6th January, 1840, would be received in *Baltimore* on the morning of the 11th January, 1840; and that in January, 1840, *Thomas Phenix* was the cashier of the *W. B. of B.* which bank had discounted said draft for the use of the drawer, and on the 2d January, 1840, had remitted the same to the plaintiffs at *C.* as its agents, for collection.

The plaintiffs then read in evidence the agreement of counsel for both parties, viz.

"It is admitted on the part of defendant that the plaintiffs were in partnership as alleged in the declaration, and that their christian names are truly set forth. It is also admitted that the affidavit by the notary public read on the former trial shall be

used on the next trial; and the plaintiffs agree on their part to produce the original letters (or copies of them) from the cashier of *W. B.* to plaintiffs, enclosing the draft in suit originally to plaintiffs, and the letter of plaintiffs returning the same to *W. B.* previous to suit—the copies to be used as originals. It being understood that each party reserves all exception to the materiality of the matters above specified, and that this agreement shall not affect the order of proof, or relieve either party from the necessity of offering the above matters as his evidence."

The defendant then proved by said *T. Phenix* that said draft was returned to him in a letter of plaintiffs dated 26th Sept. 1840, and that after receiving it he struck out the special endorsement thereon, signed "*Th. Phenix, Cashier.*"

Whereupon the plaintiffs' counsel proposed to ask said *Phenix* to state the reasons which induced him to strike out said endorsement, but the court (LE GRAND, A. J.) refused to allow said question to be put to the witness. The plaintiffs excepted.

2D EXCEPTION.—After the evidence stated in the aforegoing exception, made a part hereof, the plaintiffs further proved by said *P.* that he left the city of *B.* on business of the bank, on the afternoon of the 9th January, 1840, and did not return for several days; and then further proved by *James Hall* that in January, 1840, he was the corresponding clerk of the *W. B.* and as such, it was his business to examine and attend to the correspondence addressed to said *Phenix*, the cashier.

The plaintiffs then produced to said witness, *Hall*, a book marked "*bill book*," which the witness verified as a book regularly kept by him in the *Western Bank*, as its corresponding clerk, and which was kept in said bank as a bank book, to which its officers had access. And the said *Hall* further stated, that said book shews by the entries therein the date of each draft discounted by said bank, the amount thereof, the time when due, the time when sent by mail for collection, and how charged, and that the entries therein were made by said *Hall*, as such clerk, in the regular and daily course of his business as such clerk.

The plaintiffs' counsel, for the purpose of showing when the notices referred to in the aforegoing affidavit of the notary were received at the *Western Bank*, then proved by said *Hall* that the entries in said book in relation to the draft now in suit were made by him in the course of his business, and that it was his uniform practice to make all his entries truly and at the time of each transaction; and that the words "*N. A. 11th January*, 1840," written against the entries relating to the draft in suit, in said bill book, are in the proper hand-writing of said *Hall*, and that they mean and are intended to signify that notice of the non-acceptance of said draft on that day received by him as such corresponding clerk, and that the said *Hall* has no doubt of the accuracy and verity of said entry, although he has no recollection of the fact of such notice being received at any time. And the said plaintiffs at the same time read to the jury the original entries in said book, including the words "*N. A.* 11th January, 1840."

The plaintiffs then further proved by *Taylor*, that in January, 1840, he was runner of the *W. B.* and as such it was his business to serve all notices placed in his hands by the officers of said bank, to be served on residents in the city of *B.* and that it was his invariable practice to serve said notices on the day they were delivered to him. That the said witness recollects having called some time in January, 1840, at the place of business of the defendant with a notice of protest for him, and another for *N. U. C.* That he read enough of said notices to see who were the parties to be notified, and that they were notices of protest, but he did not read every word or the date of said notices. That he handed the notice made out for the defendant to him, remarking that it was a protest for him and *Chafee*, who returned it to him with a request that he would give it to said *C.* and said witness accordingly left the same at the dwelling house of said *C.* on same day. That said witness, *Taylor*, has no recollection of the day of the month on which he delivered said notice to said defendant, but he recollects that the ground was then covered with a very deep snow, the heaviest

snow in that winter, and that he recollects no other notice to defendant in said month.

The plaintiffs then further proved by *Th. Phenix*, that when he left *Baltimore* on the afternoon of the 9th January, 1840, and for several days before, there was a very deep snow on the ground, so deep that some days before said 9th January the travelling had been obstructed. That said *Phenix* was compelled to travel in a sleigh from *Harpers Ferry* in *Virginia*, to *Winchester*, on the 10th January, and from thence to *Woodstock*, in a sleigh, on the 11th and 12th January, 1840, and that said snow was the heaviest of the winter, according to the recollection of said *Phenix*. The plaintiffs then further proved by said *Phenix* that before this suit was commenced, and early in October, 1840, and after the bill in suit was returned to him by the aforesaid letter of 26th September, 1840, he took the bill and protest to *Whiteford*, the defendant, and asked him for payment. That defendant expressed great surprise, and said he had no notice of protest for non-payment. Witness replied the bank had none either, but you had notice of non-acceptance, to which *Whiteford* replied, "yes I might have had that," and objected to payment for want of notice of protest for non-payment. The plaintiffs further proved by said *Phenix*, that said draft had been retained in *Charleston* aforesaid, by plaintiffs, from January, 1840, until the 26th September, 1840, and that the said *Phenix* never received any notice of its protest for non-payment, or any communication from plaintiffs relating thereto, after the month of January, 1840, until by said letter of 26th September, 1840.

And the plaintiffs further proved by said *James Hall*, that he was corresponding clerk of the *W. B.* until the 26th September, 1840, and he never received or saw any notice relating to said draft, shewing a protest for non-payment, or of presentment at maturity for payment thereof. The plaintiffs then further proved that this suit was brought on the 9th November, 1840, as appears by the original docket entries, and that by a clerical misprision the writ was stated as having been issued on the 9th October, 1840.

Thereupon, the plaintiffs, for the purpose of shewing that the plaintiffs had a right to maintain this suit, and to shew possession and right of possession in them, of the draft now in suit, at the institution of this suit, offered to prove by *Thomas Phenix* that on the 2d October, 1840, he wrote to the plaintiffs the original letter, post-marked at *Baltimore*, of that date, now shewn him by plaintiffs' attorneys.

W. B. Baltimore, Oct. 2, 1840.

MESSRS. C. B. & Co.

Dear Sirs:—I regret to inform you that the endorser on the bill, returned to me a few days since, on *Blum & Cobia*, inclines to take advantage of the absence of protest for non-payment. By reference to my letter of 2d January last, you will perceive the importance attached to the name of the endorser, and having lost all remedy against him by your omitting to protest, your knowledge of commercial affairs must admit the justness of my claim against your house for the bill. I have therefore charged your account, and expect a credit for it. *Messrs. Caldwell & Sons* and *Blum & Cobia*, being consignees of *N. U. C.* I am in hopes you can find property enough in their hands to protect you from loss.

Very respectfully,

TH. PHENIX, *Cashier.*

Post-marked—"*Baltimore, Md.* October 2d," and addressed, "*Messrs. C. B. & Co. Charleston, S. C.*"

That in point of fact he enclosed in said letter the draft now in suit, and sent it in said letter, and then offered to read said letter to the jury to be considered by them with the aforesaid statements of said *Phenix* in relation to the said draft having been enclosed therein, but the court (LE GRAND, A. J.) refused to allow said letter and said evidence of said *Phenix* so offered to be given to the jury, and excluded the same as inadmissible, and the plaintiffs excepted.

3D EXCEPTION.—After the evidence stated in the aforegoing bill of exceptions as having been given and offered, (which bill of exception is made a part hereof) the plaintiffs, further to

prove by said *Phenix*, that on the 2d October, 1840, he enclosed the draft in suit in the letter aforesaid, of that date, now produced by plaintiffs' counsel, and sent the same by mail to the plaintiffs; and the plaintiffs then offered to give in evidence, by said *Phenix*, the fact of said letter having enclosed said draft at the time of its being mailed for transmission to the plaintiffs. The plaintiffs' counsel stating at the same time that he offered said fact with a view to, and for the purpose of shewing possession of said draft in suit, in the plaintiffs at the institution of this suit, but the court refused to allow said fact so offered in evidence to be given to the jury, and excluded the same, together with the statements of said *Phenix* in relation thereto, and the plaintiffs excepted.

4TH EXCEPTION.—After the evidence stated in the aforegoing bills of exceptions, (made a part hereof) the plaintiffs further offered to prove by said *Phenix* that he received, in January, 1840, the original letter of plaintiffs, now produced, dated 6th January, 1840, and post-marked at *Charleston, S. C.* same day.

Charleston, January 6th, 1840.

MR. T. PHENIX, *Balt.*

Dear Sir:—Your valued favor of the 2d is at hand with *Chafee's* draft on *Blum & Cobia* for $1,500, which we are sorry to say is under protest for non-acceptance, and the other on them is not yet accepted, but they express an opinion that it will be paid.

We now hand you, enclosed, *Hopkins & Stocklor's* dft. accpt. for $2,000, protested for non-payment, and charge you the same with protests. Yours, in haste,

C. B. & Co.

Post-marked—"*Charleston*, Jan. 6th," and addressed to "*T. P., Esq. Cashier W. B., B.*"

That on the 30th September, 1840, he wrote to plaintiffs the letter of that date, post-marked on same day at *B.* the original of which is now produced to said witness by plaintiffs' counsel.

WESTERN BANK OF BALTIMORE,
Baltimore, Sept. 30, 1840.

MESSRS. C. B. & Co.

Dear Sirs:—I have received your favor of the 26th inst. with enclosures as stated. The draft on *Blum & Cobia* ought to have been protested for non-payment, to hold the endorser the most responsible name on it. I have sent notices to the parties, and should the endorser demur, I will advise you forthwith. Very respectfully,

T. P., *Cashier.*

Post-marked—"*B., Md.*" and directed to "*Messrs. C. B. & Co., C., S. C.*"

And that on the 2d October, 1840, he wrote to plaintiffs the aforesaid letter of that date, and that the same enclosed the draft in suit, and that the said *P.* as cashier of the *W. B.* received, in due course of mail, the original letter of the plaintiffs, dated 7th October, 1840, and post-marked at *C., S. C.* on same date, and that the draft in suit was enclosed in said letter.

C., October 7th, 1840.

MR. T. P., *Balto.*

Dear Sir:—Your favor of the 30th ult. and 2d inst. are at hand, returning *C's* dft. on *Blum & Cobia*, $1,500. This dft. was regularly noted for non-acceptance, and the drawer and endorser furnished with notice of same. Our young man laid it away in our chest where it was overlooked, but as *Messrs. Blum & Cobia* had not, nor has since had, any funds of the drawer, we do not think much of the honor of the endorser who would take advantage of an oversight when no loss has accrued to him thereby. We presume, according to strict mercantile usage, we are responsible to you, but only when you have proceeded against the draft, and obtained from the parties all you can; the balance, if any, we will have to make up. We, therefore, return you the draft with protest for non-acceptance. For the purpose, however, of settling this unfortunate

business, if you can make a compromise with them at once, and yield up a part, we will make up the deficiency at once.

We remain yours, respectfully,

C. B. & Co.

Neither *Messrs. Blum & Cobia*, or *Messrs. Caldwell & Sons*, have any property of *Mr. Chafee's*.

N. B. We charge *C. B. & Co.* with the above this day, 12th October.

Post-marked—"*C., S. C.*, Oct. 7," and directed to "*Mr. T. P., Cashier W. B., B.*"

That immediately on the receipt of that letter the said *P.* as cashier of said bank, caused said draft to be charged on the books of the said bank to account of the plaintiffs, and at the same time offered to read said entry making said charge, which it is agreed is made in the proper book of said bank, and shews the entry of such charge on the 12th October, 1840, both parties agreeing to dispense with a copy of said entry in this exception.

And the plaintiffs, at the same time, offered to prove by said *P.* that he wrote the original letter to plaintiffs, dated 31st October, 1840, and post-marked same day at *Baltimore*, which is now shown him by plaintiffs' counsel.

W. B., Baltimore, Oct. 31, 1840.

MESSRS. C. B. & Co.

Dear Sirs:—A favorable opinion of the attorney to whom I have entrusted the case against the drawer and endorser on the bill of $1,500, not accepted by *Messrs. Blum & Cobia*, induces me to suggest to you that a discretionary power be left us in regard to a compromise. In your last favor, the order seemed to be peremptory on us to offer a settlement with the parties, and that at a heavy sacrifice.

By your permission we will defer this for the present, believing that a little delay will be to your interest, and by holding out, better terms can be made.

Please advise by return mail.

Very resp'y, T. P., *Cashier.*

Post-marked—"*B., Md.*, Oct. 31," and directed to "*Messrs. C. B. & Co., Charleston, S. C.*

And that he received, in due course of mail, plaintiffs' original letter in reply thereto, dated *Charleston*, Nov. 5, 1840.

C., Nov. 5, 1840.

T. P., Esq., *Baltimore.*

Dear Sir:—Your valued favor of 31st reached us this day. We authorize you to take any course you may deem for your interest in the settlement of the dft. on *Blum & Cobia*, observing to you, however, that we should prefer a reasonable sacrifice to get the business settled at once, and, if agreeable to you, we would be glad if you would name what sum you would take from us to relieve us from all responsibility in this business. We understand that the endorser on the draft is quite an honorable man, and if so, we are satisfied that no honest man would take advantage of an unintentional omission to relieve himself from responsibility when no loss could eventuate to him. You will, of course, consider this letter as confidential, and not let the parties be acquainted with any anxiety on our part to compromise. Yours truly,

C. B. & Co.

And that it was received before the suit was brought.

The plaintiffs further offered to prove by said *Phenix*, that before this suit was brought, he handed the enclosed note to *Mr. J. V. L. McMahon*, one of the plaintiffs' attorneys, and requested him to bring suit thereon in the name of the plaintiffs.

And the plaintiffs further offered to prove by *Wm. H. Collins, Esq.*, that at the time this suit was brought he was in possession of the draft in suit, and had been for several weeks before, and that he is the same counsel whose name is signed to the declaration in this cause. The plaintiffs' counsel stating at the same time, that he offered the whole of said offered evidence for the purpose of showing such an interest or possession in the draft or bill in suit, by the plaintiffs, at the institution of this suit, as would enable them to maintain this action in their names. But

the court refused to allow the said offered evidence, or any part thereof, to be given to the jury, and excluded the same and every part thereof, to which action and refusal of the court, the plaintiffs excepted.

5TH EXCEPTION.—After the evidence stated in the aforegoing exceptions, (made a part hereof) and the evidence being closed, the plaintiffs, by their counsel, prayed the court to instruct the jury that there is evidence in this cause from which the jury may find a sufficient interest in the plaintiffs to maintain this suit, and that the defendant had notice of the protest for non-acceptance of the draft or bill in suit, on the 11th or 13th January, 1840, but the court refused to grant said instruction, and plaintiffs excepted.

The verdict and judgment of the court below being in favor of the defendant, the plaintiffs appealed to the Court of Appeals.

The cause was tried before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By HORSEY and BRENT for the appellants, and

By RICHARDSON, *Attorney General*, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This is an appeal from *Baltimore* County Court.

The suit was brought by the appellant upon a bill of exchange, in the following words:

Baltimore, 1*st January*, 1840.

Ninety days after date please pay to the order of *David Whiteford*, fifteen hundred dollars, which charge, as advised, to account of Your ob't servant,

NICHOLAS U. CHAFEE.

To MESSRS. BLUM & COBIA, *Merchants*, *Charleston*, *S. C.*

This bill of exchange was endorsed by the payee, the defendant in this suit, in blank, and under this blank endorsement was written, "Pay to order of Messrs. *C. Burckmyer*

& Co., Th. Phenix." This latter endorsement appears was erased before its *second* transmission to *South Carolina.*

The action then was brought by the appellants claiming to be the owner and holder of the bill against the payee, who had endorsed the same in blank. It was incumbent upon the plaintiffs to prove, in addition to the signature, a presentment of the bill to the drawers, and notice to the defendant in due time of the non-acceptance; the same, it being alleged, was not accepted when presented. Besides the liability of the defendant, the plaintiffs were also to show that a suit against the endorser could be sustained in their name. In the attempt to prove all this, the bills of exception were taken, which give rise to the questions which the court is now to decide.

It appears by the *first* exception, that after the plaintiffs had offered the proof which it is supposed give them a right to recover, the defendant proved by the cashier of the *Western Bank*, (by which institution this bill had been negotiated) that the bill was returned to him in a letter of plaintiffs', dated 26th September, 1840; and that after receiving it, he (the witness) struck out the special endorsement thereon, signed *Thomas Phenix, Cashier:* and thereupon the plaintiffs' counsel proposed to ask *Phenix* to state the reasons which induced him to strike out said endorsement. The court refused to permit this enquiry to be made. For this refusal, the first exception was taken.

It is not perceived by this court that there could be any good reason for refusing to permit the enquiry to be made, unless it be, that the *act* proved on the part of the defendant was one which could not prejudice the plaintiffs. If it was of any importance in the cause to know who erased the special endorsement spoken of, surely it was but reasonable that the witness should be allowed to state when, why, and under what circumstances, the erasure was made. It might have been done by mistake; it might have been an unauthorized act.

In regard to the *second, third,* and *fourth* exceptions, it is to be observed, that they relate either to the liability of the defendant on this bill of exchange, or to the right of the plain-

tiffs to institute the action in their own name. During a portion of the time between the non-acceptance of the bill, and the institution of this suit, the *Western Bank* was unquestionably the owner of this instrument, and the proper plaintiff in any action to be instituted upon it. Much of the testimony to be found in these bills of exceptions was offered in order to show when, and under what circumstances, the bank made a transfer of this bill of exchange to the plaintiffs. For this purpose, all that passed between the bank and the plaintiffs relative to the transfer by the former to the latter of this bill of exchange, may be offered in proof, and thus only, is the plaintiffs' title to it to be shown. Much of the testimony, and of the *documents*, are connected with the plaintiffs' chain of title, and is no more obnoxious to objection than other title papers equally *res inter alios acta* would be. *Barney vs. Patterson's lessee*, 6 *H. & J.* 204. And much testimony is admissible as part of the *res gesta*, in thus deriving title to the bill of exchange from a person who is no party to this suit.

It will here be noticed that objections found to exist to some of the correspondence which was declared to be inadmissible on a former appeal in this case, (1 *Gill*, 146,) were upon the *second* trial removed. A letter or other paper, offered in proof of title from one person to another, though admissible for that purpose, may be utterly inadmissible for others. It may contain statements which, if objected to by the party, who alone can insist that the whole paper be read, ought to be excluded. In the former case, each and every part of the letter was in despite of objection admitted. In this case, the whole and every part of it was rejected. For this, the plaintiffs took the three several exceptions—and of this have they not a right to complain.

It is thought that they have, and that much of this testimony was admissible to prove the title of the plaintiffs to this bill of exchange. These are "surrounding circumstances," constituting a part of the *res gesta*, which were cotemporaneous with the principal fact under consideration. The transfer of this bill by the owner of it, at a particular period, to the plain-

tiffs, or to some other person from whom they derive title, and the admissibility of them is to be determined by the judge, according to the degree of their relation to that fact, in the exercise of his sound discretion. 2 *Greenleaf on Evidence*, *sect.* 108.

Much, indeed, of the testimony to be found in the bill of exceptions might have been omitted, if the defendant did not require it to be read in connection with the rest; but, in this case, the defendant selected no part or sentences as inadmissible,—but the court excluded especially in the *fourth* exception the whole testimony, even that of *Phenix*, in relation to the delivery of the bill of exchange to *Mr. McMahon*, and that of *Mr. Collins*, in relation to his being in possession of the bill as counsel for the plaintiffs. Such evidence this court thinks, was admissible for the purpose for which it was offered. That last spoken of was produced in order to show that the plaintiffs, by their counsel, were in possession of the bill of exchange at the time of instituting the suit; and if believed by the jury, it is thought, proved the plaintiffs to have been rightfully in possession of it.

The holder of a bill of exchange still has such a possession of it as will enable him to sustain an action in his own name, although he, or his agent, has left with the attorney of the plaintiffs the note, in order to bring suit thereon. *Phenix*, in delivering this instrument to *Mr. McMahon*, was the agent of the plaintiffs, and had the same in his possession, in order to make, if it could be made, a settlement with the defendant. The power to compromise, which he had, was given him by the plaintiffs, and could be derived from no other person. "If the note, after being endorsed in blank, is delivered in pledge by the payee, this will not prevent the payee from suing upon it in his own name, or again transferring it." 2 *Greenleaf on Evidence*, *sect.* 168. And see 7 *Greenleaf's Reports*, 28.

It appears by the last exception, that the plaintiffs next prayed the court to instruct the jury that there is evidence in this cause from which the jury may find a sufficient interest in the plaintiffs to maintain this suit; and that the defendant had

notice of the protest for non-acceptance of the draft or bill in suit on the eleventh or thirteenth day of January. This instruction, also, the court refused to give.

Upon the former appeal, 1 *Gill*, 146, the court said—not only that a bill payable to bearer, or payable to order, and endorsed in blank, will pass by delivery, but that the bare possession is *prima facia* evidence of title, and that possession of such a bill will entitle the holder to sue.

Again, possession of a note endorsed in blank, will enable the party having it to maintain the action, unless *mala fides* be proved. Courts of law will never enquire whether the plaintiff sues for himself, or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. There is, in the opinion of the court, proof that the plaintiffs had an interest in this bill, which authorized them to demand the amount sued thereon, and to maintain a suit therefor.

With respect to the second branch of the prayer, it might have been that the jury might infer from the proof that due notice was given of the non-acceptance—but it is that notice was received on the 11th or 13th January. It appears, however, that the 12th was on Sunday—and therefore, notice on the 13th of non-acceptance was in time.

We think that the jury might have inferred that the defendant had due notice of the non-acceptance: of course, the court below erred in refusing to give the instruction.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DAVID CARSON, SEN. AND DAVID CARSON, JR. *vs.* A. A. WHITE, CLAIMANT, &c.—*December*, 1847.

The plaintiffs, on the 21st September, 1844, filed proceedings in *Baltimore* County Court, under the act of 1838, ch. 205, to establish a lien for work and labor done upon a house in the city of *Baltimore*, at the request of J. The claim filed showed that the work had been done between May and September, 1844, and the proof *offered* in support of it was the written admission of J. made in September, 1844, that the claim was correct. It appeared that in July, 1844, he had mortgaged this property to W. *Held:* That a mortgage would afford very little security for the debt intended to be secured thereby, if, after its execution, the mortgagor could by admissions create liens on the mortgaged premises; and thereby lessen or destroy the value of the mortgage.

The mortgagor can by no acknowledgment subsequent to the mortgage, prejudice the interest of the mortgagee; and hence the admission in this case ought not to have been received.

A mortgagee, in such a case, claiming the property sought to be affected by the plaintiffs, may appear to and defend the action.

This proceeding was in *rem*.

The trustees of the debtor-mortgagor, under the insolvent laws, might have appeared to defend the equity of redemption.

Our attachment laws do not expressly authorize a claimant of property to appear to an attachment; yet claimants are permitted to interpose their claim against a judgment of condemnation.

No mechanic, in virtue of the act of 1838, has a lien on the house which he has built or repaired, unless he has *filed* in the office of the Clerk of *Baltimore* County Court, a statement of his demand, and in that statement has given, not only the *sum due*, but also the *nature* and *kind* of work done, and the *kind* and *amount* of materials furnished, and the *time* when the work was done and materials furnished.

To obtain such a lien, the statement *filed* must state the particulars of his demand, the items, whereby all who may be interested can ascertain not only the amount demanded, but the correctness and reasonableness of the demand itself.

These statements, when filed, must be explicit and comprehensive, to protect strangers to the contract, who may have other contracts relating to the same property or liens thereon, from fraud, and may be required by the party at whose request the work is performed.

APPEAL from *Baltimore* County Court.

On the 21st September, 1844, *David Carson, Sen.* and *Jr.*, prosecuted, out of the County Court, a writ of *scire facias*, reciting:

"Whereas, *D. C. Sen.* and *D. C. Jr.*, carpenters, carrying on trade under the firm of *D. C. & Son*, have filed a claim in our court, for the county of *Baltimore*, against *John Carson* of *D.*, for the sum of $357 50, with interest from, &c., for work done by them as carpenters, and for painting, plastering, glazing and materials furnished, and for grading, digging and brick work done, in the erection and construction of a brick dwelling house, being two stories and an attic high, with a basement covering the whole front of the following lot. Beginning for the same at, &c., as a lien as well against said lot of ground and dwelling thereon as against said *Carson*, owner or reputed owner thereof. And whereas, it is alleged that the said sum still remains due to the said *D. C. Sen.* and *D. C. Jr.*, partners as aforesaid, now we command you, that you make known to the said *John Carson* of *D.*, and to all such persons as may hold or occupy the said building, that they be and appear before the judges of our said court, at a court to be held at *Baltimore* city, on the first day of January next, to show if any thing they know or have to say, why the said sum of, &c. should not be levied of the said building, to the use of the said *D. C. Sen.* and *D. C. Jr.*, partners as aforesaid, &c."

This writ was made known by copy left with tenant in possession, 25th September, 1844, also advertised according to law. "N. TRACY, *Sheriff*."

John Carson of *D.* appeared and pleaded that *D. C. & Son* did not do and perform upon, in or about the said building, the work and labor in the said claim, in the said writ mentioned, or any part thereof, &c.

And for further plea in this behalf, &c., the said defendant says, that the said plaintiffs did not furnish the materials, in their said claim charged, in and about the building of the said house, upon the said lot, &c. And of this he puts himself upon the country, &c. T. P. SCOTT, *Attorney Defendant.*

Ambrose A. White, at January term, 1846, filed his petition, alleging that before the filing of the claim of lien in this case

by the said plaintiffs, to wit: on 14th July, 1844, the said defendant, by deed of that date duly mortgaged the said lot of ground, in the said case mentioned to him, the said *Ambrose;* and that afterwards, to wit: on the fifth day of August, 1844, and before the filing of the said claim, the said defendant applied to the commissioners of insolvent debtors of the city and county of *Baltimore*, for the benefit of the insolvent laws of *Maryland*. And the said *Ambrose* says that he is the party in interest, in the matter of this suit, against the said property as above stated. Wherefore he prays the court here to permit him to defend the said suit, &c.

Leave was granted to the said *Ambrose A. White*, to appear as claimant, and defend the said suit as prayed; and he accordingly appeared.

At the trial of this cause, the plaintiffs to prove the issue on their part, offered in evidence, *the claim on which the writ issued in this case*, a general statement of the claim as set forth in the *scire facias* and the following account:

John Carson of *D.* To *David Carson & Son.*

To amount of work done as per verbal contract for carpentering, painting, plastering and glazing, and materials for the same, in and upon the dwelling-house on *East Baltimore* street, described above, ...	$335 00
To extra framing of cupboard, ...	10 00
" grading yard, digging, &c.	10 00
" brick work, viz. paving yard and hearth and cutting up for slating, ...	2 50
	$357 50

Said work having been commenced on the 1st May, 1844, and finished on the 14th September, 1844. Filed to be recorded, the 20th September, 1844, same day recorded and examined Per Thomas Kell, *Clerk.*

21st September, 1844, *sci. fa.* issued, No. 48, to January term, 1845.

True copy. Test, A. W. Bradford, *Clerk.*

Also, a written admission of *John Carson* of *D.*, the original defendant in this cause, as to the correctness of the plaintiffs' claim, as follows :

Mr. John Carson, To *David Carson & Son*, Dr.

1844, May 1st, (in pencil.)	To amount of contract work, carpentering, painting, plastering, and materials for the same, ...	$335 00
	To extra framing cupboard, &c.	10 00
To grading yard, digging, &c.		10 00
" brick work, viz. [in pencil,] paving hearths and yard, and cutting up for slating, ...		2 50
		$357 50

Int.

Baltimore, 1844, 20th September. I admit this bill for $357 50, to be correct as above stated, per contract (verbal) between us, and for extras. JOHN CARSON of *D.*

To the admissibility of this evidence, the defendant's counsel objected, because the said *John Carson* of *D.* having acquired the house and lot on which the lien in this case is claimed, on the 6th April, 1844, had mortgaged the same on the 11th July, 1844, to *Ambrose A. White*, and on the 5th August, 1844, had filed his petition as an applicant for the benefit of the insolvent laws of *Maryland*, and the said admission was made thereafter, viz. on the 20th September, 1844, which objection the court (PURVIANCE and LEGRAND, A. J.) sustained, the said *John Carson* of *D.* being then the defendant on the record, and said mortgage and application being admitted. The plaintiffs excepted.

The plaintiffs excepted also to the leave granted to *A. White* to appear and defend this cause.

It was then agreed between the counsel that the pleas theretofore filed, should be considered as filed by said *White*, errors waived: and that he, *White*, be responsible for all the costs as defendant.

The plaintiffs then offered in evidence the claim on which

the writ issued, deposition to maintain the same, and proof of a particular measurement bill of the work done, and its value.

The defendant, on his part, offered in evidence, a deed of mortgage from *John Carson* of *D.* to *Ambrose A. White*, of 11th July, 1844, it being admitted to have been on the house in question, which said *John* had bought in April, 1844.

The defendant prayed the court to instruct the jury that the plaintiffs are not entitled to recover in this suit:

1st. Because there is no evidence of any special contract between the plaintiffs and the defendant for the work and materials, said to have been done and performed, in and upon the buildings, &c. and furnished therefor, &c. as stated by the said plaintiffs in the paper filed by them, with the clerk of this court, upon which the said writ issued.

2d. Because there is no evidence of any such contract between the parties as that set forth in the said claim filed, &c.

3d. Because the said pretended claim, upon which the said writ issued, and which pretended claim was filed in the office of the clerk of this court, before the issuing of said writ, does not set forth the amount or sum claimed to be due for the *work and labor* said to have been done and performed in and upon the said lot of ground in the said claim mentioned and described.

4th. Because the said pretended claim upon which, &c. and which was filed, &c. does not set forth the amount or sum claimed to be due for *materials* said to have been furnished, &c. or the nature and kind of such materials so said to have been furnished, &c.

Which prayers the court granted. The plaintiffs excepted.

The trial of the cause having been commenced on the 4th, the prayers of defendant were considered, and decision thereupon delivered on the morning of the 5th February. Whereupon on said 5th, before the final decision of the case, the plaintiffs by their counsel filed the following motion and affidavits.

The plaintiffs asked leave of the court, and at this stage of the cause, (when the plaintiffs and defendant had concluded

their respective evidence, and defendant had submitted three several prayers to the court, who had decided thereon) to offer evidence of the special contract set forth in the claim for lien filed in this cause, and the leave is prayed because of the discovery of such evidence (to establish the making of said special contract,) since the adjournment of this court on the 4th instant, when the trial was, so far as above stated, concluded, the existence of which evidence was previously unknown to plaintiffs or their counsel, and not by any of them discovered until the evening of the 4th, after the adjournment of the court. That *George Gelbach* is the witness by whom the plaintiffs expect to establish the existence of said special contract. This motion was sustained by the affidavit of one of the plaintiffs.

This prayer was submitted, notwithstanding the 25th rule of said court, viz.:

"25th. The court will require, in all cases, that the whole testimony intended to be produced by both plaintiff and defendant shall be offered before any question of law is raised, except objections to the competency of testimony, which must be made when it is offered, or as soon thereafter as the party shall be apprised of the grounds of such objection. After the whole evidence is concluded, the court, when required, will instruct the jury on the law of the case, and the verdict shall be taken, or a non-suit entered, with leave to either party to move the court in bank to set aside the verdict, or non-suit for mis-instruction at the trial."

This motion the court overruled, and declared the evidence offered, at that stage of the cause, because of said rule, inadmissible; although discovered since the submission of the cause on the preceding day: and before its final decision. To which decision of the court, overruling said motion and excluding said evidence, the plaintiffs excepted.

The verdict and judgment in this case being against the plaintiffs, they prosecuted the present appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By W. J. WARD, for the appellants, and

By T. P. SCOTT, for the appellee claimant.

MAGRUDER, J., delivered the opinion of this court.

This is a proceeding by *scire facias*, grounded upon the act of 1838, chap. 205. The plaintiffs' claim is for work done, for carpentering, painting, glazing, and materials for the same, in and upon the dwelling-house in *East Baltimore* street, of which a description is given. The *scire facias* directs the sheriff to make known to said *John Carson* of *David*, and to all such persons as may hold, or occupy, said building, "to appear in *Baltimore* County Court, on the first day of January, 1845, to show if any thing they know or have to say, why the sum claimed should not be levied of the said building to the use of said *David Carson, Sen.* and *David Carson, Jr.* partners as aforesaid, if to them it shall seem expedient."

The sheriff's return is "made known by copy left with the tenant in possession 25th September, 1844, and also advertised according to law."

Who was the tenant in possession is not stated, but at the same term, *John Carson* of *David* appeared, and by plea, denied that the plaintiffs did "do, or perform upon, in or about the said building the work and labor in the said claim in the said writ mentioned, or any part thereof. And for further plea said that the said plaintiffs did not furnish the materials in their said claim charged, in or about the building of the said house upon the lot aforesaid."

At January term, 1846, the appellee appeared in court, and suggested that before the filing of the claim of lien, 4th July, 1844, the defendant mortgaged the said ground to him, and on the 5th August, 1844, (before the filing of the said claim of lien by the plaintiffs) the defendant applied for the benefit of the insolvent laws of *Maryland*, and the appellee suggested that he is the "party in interest in the matter of this suit against

the said property," and prayed the court to be permitted to defend the said suit.

The record states that the leave was granted, and the appellee accordingly appeared to said suit by his counsel. Immediately following this is an agreement signed by counsel, that the pleas shall be considered as filed by the appellee, errors waived, and the said appellee (*White*) is individually responsible for all the costs as defendant.

There was a verdict for the defendant, several bills of exception having been taken by the plaintiffs in the course of the trial, which are now to be examined.

In the first exception, it is stated that the plaintiffs to support their claim, offered in evidence their statement of the work alleged to have been done by them in and about the house on the lot there described, and at the foot of it this acknowledgment:

"*Baltimore*, 1844, 12th September.

"I admit this bill for $357 50 to be correct as above stated, per contract (verbal) between us, and for extras.

Signed, JOHN CARSON of *D.*"

To the admission of this evidence the defendant objected, because the said *John* had, before the said admission, executed the mortgage and made the application for the benefit of the insolvent laws—which facts were admitted by the plaintiffs.

Because of the rejection by the court of this testimony offered by the plaintiffs, the first exception to be found in the record is taken. Did the court err, in refusing to admit this testimony?

A mortgage would afford very little security for the debt intended to be secured thereby, if, after its execution, the mortgagor could, by admissions, create liens on the mortgaged premises, and thereby lessen, or it might be, destroy the value of the mortgage. The mortgagor can, by no acknowledgment subsequently to the mortgage, prejudice the interest of the mortgagee. The admission made in this case by the mortgagor ought not to have been admitted in the trial of those issues.

Immediately following the first exception it is stated—the

defendant's counsel then made a written motion as follows: referring to the statement before given, and praying that the appellee for the reasons therein stated, have leave to defend, which is granted by the court, and to this there is an exception by the plaintiffs.

This part of the record, taken in connection with what has been previously stated, relative to an application by the appellee to the court, is not very easily to be understood. It will be assumed, however, that the design of the exception was to question the authority of the court below, to permit an appearance in the case by the appellee.

Why should he not be permitted to appear? This is a proceeding *in rem*, and is designed to charge, with the claim of the appellants, property conveyed to the appellee, and the legal title to which we must assume was in him. Who was the proper person to appear, and resist this claim, as a claim against the mortgagee's interest? It cannot be that the mortgagor was the only person to decide whether the claim should be resisted or admitted.

It is suggested that *John Carson's* trustee, appointed upon his application for the benefit of the insolvent laws, was the proper person, and no doubt he was a fit person to defend the equity of redemption, which had been conveyed to him, if he thought it of any value; but it is equally clear, that the appellee was not bound to abandon his title to the protection of the trustee, over whom he had no control, and who, by his acts, admissions and omissions, might prejudice the rights of the appellee. If the appellee, claiming the property as he did, could not defend the suit, surely the plaintiffs ought not to be permitted to obtain a judgment, by which his interest was to be affected.

If the appellee could not be made a party, why is the sheriff to give notice to all such persons as may hold or occupy the building? Why are all such persons to appear before the judges of the court, to show if any thing they know, or *have, to say* why the sum of money claimed should not be levied of the said building, "if to them it shall seem expedient?" The appellee here

was one of the persons, to whom the sheriff, it would seem, was to give notice. Why is he to be warned to appear, if although he "have to say," why the money is not to be levied on his property, he is not to be permitted to say it? He could only say it by being permitted to be made a party to the suit.

Our attachment laws do not expressly authorize the claimant of the property attached to appear to the suit; yet claimants are permitted to interpose their claim, and the cases of *Campbell vs. Morris*, 3 *Harris & McHenry*, 552, and *Ranahan vs. O'Neal*, 6 *G. & J.* 298, tell us that they have the right to appear. If then the act of 1838 did not expressly authorize the appellee to appear; yet this being a proceeding *in rem*, his right to appear and defend his interest cannot be questioned: There are, however, many clauses in this Act of Assembly which would be without meaning, if they leave the owner of the property designated to be condemned without liberty to show cause why his property should not be made to pay a debt for which he never was answerable. See clauses 16, 17, &c.

After excepting to the two above mentioned decisions by the court, the plaintiff then offered other testimony designed to prove the amount and value of the work done, and of the materials furnished about the said house; when the testimony was offered, the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover for the several reasons set forth in the exception. This instruction the court gave, and thereto also an exception was taken.

In examining the question thus brought before the court, it is proper to bear in mind that the court is not to inquire how much of this testimony ought to have been admitted, or the value of any portion of it; if this had been an action brought for the value of this work, and of the materials furnished against the person, at whose request the materials were furnished, and the work done. The plaintiffs claim a right to a judgment, the effect of which would be to charge one man's property with the payment of a debt contracted by another,

without the request, and perhaps without the knowledge, of the owner of the property. Grounding this proceeding upon the act of 1838, they are, of course, to prove that this act gives the remedy which they seek by this proceeding; and if the proof adduced is not such as the law requires of them, they have no cause to complain of the judgment of the court below.

The act of 1838 does not deprive any creditors of the remedies which the law gives to other creditors having claims of the same description. This additional or extraordinary remedy is allowed to mechanics and some others, if they comply with the conditions in the law prescribed, and the creditors who think proper to proceed under this law must show substantial compliance by himself with its requisites. No mechanic has, in virtue of the Act of Assembly, a lien on the house which he has built or repaired, unless he has filed in the office of the Clerk of *Baltimore* County Court a statement of his demand, and in that statement has given not only the sum due, but also the nature or kind of the work done, and the kind and amount of the materials furnished, and the time when the materials were furnished, and the work done.

The mechanic, or other person then, who would claim a lien in virtue of this Act of Assembly, in his statement, to be filed in the office of *Baltimore* County Court, must not only state the sum claimed, but must also, in the statement to be filed there, for the inspection and scrutiny of all persons who are or may become interested in the premises, give a *bill of particulars*, whereby all who may be interested can ascertain not only the amount demanded, but the correctness and reasonableness of the demand. The *items* must be furnished, in order that other creditors and persons interested may know for what services, and what materials, the sum alleged to be due is claimed, and thus have an opportunity of proving the injustice or extravagance of the demand. All this must be done in terms sufficiently explicit and comprehensive, in order to prevent the frauds which otherwise might be practised upon others—

strangers to the contract, by the claimant and the reputed owner.

That the Act of Assembly was not in this case complied with, will be made obvious by a comparison of the statement of the demand furnished by the plaintiffs, with that which makes a part of the deposition of *Samuel Harris*, to be found in the exception. The statement filed in the office is not such a statement as the law requires, and must be supposed to require, for wise reasons. Indeed, it gives only the information which is afforded, in a declaration upon a *quantum meruit*, for work done, and materials found. Yet, with that information, the defendant, although alleged to be the party at whose request the work is done, and the materials are furnished, is not bound to be satisfied, but may insist upon being furnished with the particulars before he can be required to plead; whereas, in a proceeding of this description, to affect the interests of entire strangers to the contract, if the particulars cannot be required in the statement to be filed in the office, it cannot be required by them at all.

Having failed themselves to comply with the requisites of the act of 1838, the plaintiffs cannot avail themselves of that law, but must have recourse to the remedies before existing for the recovery of their claim. There is, then, no error in the instruction given by the court in the last exception.

The act of 1845, to which we have been referred, has no application to this case.

JUDGMENT AFFIRMED WITH COSTS.

HENRY B. FREEMAN AND JANE E. SEDWICK, *Adm'rs of* JOSHUA SEDWICK *vs.* JAMES C. SEDWICK.—*December*, 1847.

C. and *S.*, brothers, not being indebted to each other, and for a nominal consideration, agreed with each other, that *C.* should convey certain personal property to *S.* *S.* by another agreement, stipulated to re-convey the property to *C.* or to him in trust for his wife and children. *C.* then agreed to confess a judgment to *S.*, who further agreed to sue out execution, levy it upon the

whole estate of *C.*, make purchases to the amount of the judgment, and then convey it to *C.* or to him in trust for his wife and children. This judgment was confessed, and *S.* died. It was then revived by his administrators. It appeared in fact, and by the answers to a bill filed by *C.* to vacate the agreements and judgments, and procure a re-conveyance of the property to himself, that their object, *known to both parties*, was to hinder, delay and defraud the creditors of *C. Held*, that the complainant was not entitled to relief in equity.

It is the policy of the law to withhold all aid and relief from parties in controversies between themselves, who stand strictly *in pari delicto*, and which might or could tend to the consummation of an agreement entered into in fraud of the law, or the rights of any person, unless in cases where public policy would thereby be promoted.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 16th January, 1845, by the appellee against the appellants. It stated, that in May, 1837, the said *James*, in order to settle certain personal estate upon himself and family, as he might afterwards determine, executed a deed thereof to his brother, *Joshua*, for the nominal consideration of $7,000; whereas, no such sum, nor any other money, nor valuable consideration, was paid by any person nor received by the said *James* therefor; that further to execute the purpose aforesaid, *James* and *Joshua* executed another agreement, under seal, dated 23d September, 1837, whereby, in consideration of $10,000, alleged to be paid to *Joshua*, he bound himself to convey to the said *James*, or to him in trust for his child or children, the personal property so as aforesaid conveyed to the said *Joshua*; that on the said 23d September, the complainant entered into a further agreement with the said *Joshua*, that the said *James* should confess a judgment on an alleged note of hand, of 1st August, 1837, on which judgment the said *Joshua* was to have execution levied on the whole of the said *James'* real and personal property, and buy the same, and convey the whole thereof to the said *James*, or to him in trust for his wife and children, by which agreement it was also provided to enter the same satisfied; that in pursuance of such agreement, the judgment was confessed for $10,000, with interest; that on the 7th Decem-

ber, 1842, *Joshua* died; the appellants were appointed his administrators; that the complainant never was indebted to the said *Joshua* in any of the sums mentioned in the said deed and judgment, was neither indebted to *Joshua* or his administrators at any time, that *Joshua* was indebted to him, and his administrators paid him; that he, the appellant, has always remained in the possession of the personal property, claiming the same as his own; that he has required said administrators to reconvey to him, and cancel said agreements, which they refused, and that said administrators are about to take possession of his property, and proceed on said judgment, to enforce the same by sale. Prayer for a re-conveyance of the property and its increase; that the judgment may be entered satisfied, and the whole business annulled and set aside: and for subpœna, injunction and general relief.

The answers admitted the conveyance to the deceased, *Joshua*, without any personal knowledge in the defendants of the consideration for the same—nor of the motives which led to the same, &c. But they have heard and believe, that at and before the time of executing said conveyance, the said complainant became largely indebted unto divers persons, and executed the said conveyance with the intent and design of defeating and defrauding his said creditors in the recovery of their just claims, and of securing said property to himself and family. The agreement to re-convey was admitted, which was alleged to be further to effectuate the said fraudulent intent. The judgment and execution were also admitted, as a part of the machinery to be resorted to, to consummate such fraud; that the judgment was revived by *scire facias* after *Joshua's* death. The answer also admitted the intent to take possession of the negroes conveyed to their intestate, and to issue execution, that, as the child of *Joshua* is an infant of tender years, they cannot safely enter up satisfaction of the judgment; and they submit themselves to such decree as the Chancellor may award.

Exhibit No. 1, filed with the bill, was a conveyance by *James C. Sedwick*, in consideration of $7,000, paid to him by *Joshua*, for a variety of negroes and other personal property,

absolutely, dated 2d May, 1837, duly acknowledged and recorded.

Exhibit No. 2.—An agreement of 23d September, 1837, between *Joshua* and *James*—that *Joshua*, in consideration of $10,000, to him in hand paid, hath agreed to convey to *James* the property mentioned in Exhibit No. 1, on demand, to him, or to him in trust for his children and child, or children yet to come: and for the faithful performance thereof, the parties, respectively, bound themselves, each to the other, in the sum of $20,000.

Exhibit No. 3 was another agreement of the 23d September, 1837, between the same parties, by which *Joshua* agreed to take the earliest opportunity in making a judgment on a note of hand of *James'*, dated 1st Aug. 1837. And the said *Joshua* did also agree to issue on the said judgment against the said *James*, and execute the whole of the said *James'* property, real and personal, and buy the whole of it, in or so far as the amount of the judgment would go, and then convey the whole amount to the said *J. C. S.*, or to him in trust for his wife and children; and "*J. C. S.* being desirous to provide for his wife in case of his death, the said *Joshua* doth further agree, in case of the said *J. C. S's* death, that his widow, *Sarah C. Sedwick*, shall be entitled to the whole of the real estate of the said *J. C. S.*, and her choice of one negro during her widowhood; provided the execution shall be carried into effect, and in case of her marriage or death, the property left to the said *Sarah C. S.* to be equally divided among the children of the said *J. C. S.* It is further understood, that if the said *J. C. S.* finds it unnecessary to carry the execution into effect, the said *Joshua* will enter the judgment satisfied, and the whole business shall be annulled and void, and of no effect."

Exhibits 4 and 5 were the judgments revived by *fieri facias* of *Joshua vs. James C. Sedwick*, for $10,000, confessed originally at October, 1837.

After the answers came in, a general replication was filed, and a commission issued, which showed by its proof the said *Joshua* largely indebted in 1837, and the motive and object of

the agreements to be as stated in the answers and opinion of this court.

At March term, 1846, the Chancellor decreed a re-conveyance of the property and satisfaction of the judgments to be entered, and that the defendant pay costs.

The Chancellor was of opinion that the deeds, agreements and judgments could not be impeached upon the ground of their being entered into in fraud of creditors, because no one, as a creditor, so far as appears by the proceeding in this cause, has drawn them in question on that or any other ground.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By STOCKETT and ALEXANDER for the appellants, and

By D. WIRT and RANDALL for the appellees.

MAGRUDER, J., delivered the following dissenting opinion.

The intestate of the appellants, by an obligation dated 23d September, 1837, stipulated to convey to the appellee divers negroes and other personal property; and to obtain such a conveyance, this bill was filed in the Court of Chancery. The appellants, who are the administrators of the intestate, rest the claim to relief upon the single ground, that a deed to the intestate conveying the same property on the 2d May, 1837, had been executed by the appellee, and, of course, accepted by the appellants' intestate, for the purpose of defrauding his (the appellee's) creditors. The defence then is, that a fraud was intended to be practised upon others, and that the appellants' intestate and the appellees were the persons who intended to practise it: that the property which the intestate covenanted to convey was fraudulently acquired by him, and therefore his contract to convey it, although no other objection can be urged to the execution of it, ought not, for that one reason, to be enforced in equity. To such a defence the maxim would seem to apply: "*Nemo suam turpitudinem allegans est audiendus.*"

"No man," said *Lord Mansfield*, 1 *Black. Rep.* 364, "shall set up his own iniquity as a defence, any more than as a cause of action."

If the appellee in this case had filed his bill to set aside the deed because there was no valuable consideration for it, the same having been executed by him to defraud his creditors, no doubt the defendants might have demurred. But there is no attempt here to meddle with the deed of the appellee to the appellants' intestate. The bill assumes that deed to be valid to vest the title to the property in the party grantee, and founds the complainant's title to relief upon the solemn contract by the party grantee, to convey the property to the complainant when thereto requested. To the fulfilment of his own contract, his representatives object simply because the title which he has undertaken to convey was fraudulently acquired by him. But such defence, admitting it to be true, in point of fact, is utterly inadmissible. "A deed," said *Justice Holroyd*, (2 *Barn. Alder*, 376,) "may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy, for no man can allege his own fraud to avoid his own deed." The fraud of which the intestate was guilty against the creditors of the complainant, set forth in the answer, can furnish no defence to a bill asking a specific execution of the intestate's contract, in regard to which it is not alleged that it is fraudulent either against the creditors of complainant or of the intestate.

Granting that the deed of the appellee might be impeached by his creditors with success, the answer to this, when urged here, is that the creditors of the appellee are not in this suit, and of course in this suit it cannot be made to appear that those creditors are prejudiced by that deed. Until it is impeached by them, no one can deny that it is a valid deed.

A conveyance may be fraudulent against creditors, provided they are the parties impeaching it; but until some of them impeach it, no body else can, upon this ground. The grantee has no more right than the grantor to say that it is void, because executed to defraud creditors; and therefore can make

no such defence when required to execute his own deliberate contract to convey the property of which he thus became the owner, no matter whether that contract is with the grantor in the deed or with a stranger.

If the grantor in the deed, or a stranger, or indeed, a creditor of the grantor, took any of this property out of the possession of the grantee, in an action of replevin brought by the latter to recover the property, the defendant could not dispute the title of which that deed furnished evidence, by any proof which could be offered, that the deed was executed to defraud creditors. They, and they only, can for this impeach the deed, and unless they choose to impeach it, none other (certainly not the grantee,) can impeach it. Proof, therefore, however conclusive, that the deed was executed with intent to defraud the creditors of the grantor, is entirely out of the case, unless the person who would adduce that proof, appears in court as a creditor, proves himself to be a creditor of the grantor, and in a situation to impeach the deed. 1 *Ves. Jr.* 161.

It may be, as is stated, that there are in *Calvert* County Court judgments against the appellee. But none of those creditors are here, and as there are none such in this court impeaching this deed, this court can know nothing of creditors anywhere else. In this case, we have no right to know, or surmise that the appellee ever was indebted to any being. The decision of the case does not depend on the indebtedness of the appellee at the time of executing this deed, or at any other time, and the affirmance of the decree of the Chancellor will not certainly prejudice the rights of any such creditors or at all hinder or delay them in the recovery of their debts.

In most of the attempts which are made to impeach the deeds of persons indebted, it is very much the practice to treat the case as if the grantor in the deed was the only culpable person, and as though the grantee, if not an innocent and meritorious party, must not be regarded as *particeps criminis*. But there would be fewer fraudulent grantors if fraudulent grantees could not be found, and to countenance such a defence as this, instead of suppressing, would perhaps

encourage fraud. As to the correctness of this defence, it would shock the morality of *Newgate*, if the grantee was alive and making it. Surely the intestate of the appellants, if the representation given by the latter is to be credited, ought not to be a favorite in equity, and entitled to the protection of the court. In order to show that the appellee is not entitled to relief, he is placed before the court in the character of a thief, and they are thus forced to represent their intestate to be a receiver of stolen goods, knowing them to be stolen. Now it may be that some general rule or maxim of equity may protect the latter when there is nothing but iniquity in his own conduct. He is entitled to the benefit of the maxim, "*Nemo suam turpitudinem allegans est audiendus*," provided it will protect them from this claim; but the rule is adopted and must be applied to the case as well when it will prejudice, as when it will protect, the grantee in a fraudulent deed. If the complainant had asked that his deed be set aside, because designed to delay and hinder creditors in the recovery of their claims, his own statement given in his bill would have defeated him, and of course, a demurrer to such a bill would have been ruled good; but the matter here insisted upon by the appellants is introduced into the case as matter of defence, and is no part of the plaintiffs' cause of action. We have already seen what *Lord Mansfield* said of such a defence.

The defence is, that the intestate not only agreed to assist the appellee in defrauding his creditors by taking a conveyance of his property; but in order to obtain that, agreed to hold the property conveyed in secret trust for the grantor and his family. Now if any such trust had been declared in the deed, it would have been equally fraudulent and void as against creditors, if they were thereby prejudiced, and chose to impeach it; but if they did not complain, could the grantee have refused to execute the trust upon the ground that others might ask that the deed be declared fraudulent and void as against them? The real ground of defence is, that the deed which gives the property to the grantee is void, and when considered void, can convey no title to him; and because of

this, it is said that he is not bound to execute his own contract, disclosing no such defect in his title to convey the title which he has in the premises.

The appellee does not ask that his own deed may be avoided, or make any objection to the title thereby conveyed; but regards it as a valid deed, and claims, in this suit, nothing but the title thereby given. He is not alleging his own fraud; and therefore of him it cannot be said, that he alleges *suam turpitudinem*. If his bill had been taken *pro confesso*, the validity of the deed could not be brought into question. The maxim spoken of then, furnishes no bar to the relief which is here sought.

The creditors, if there be creditors, of the appellee, will certainly not be hindered or delayed in the recovery of their debts, by making the debtor the unquestioned owner of the property which the appellants insist ought to be made answerable for his debts. If there are none such, if the appellee himself has satisfied them, neither law nor equity ought to hinder the execution of the contract into which the appellants' intestate entered with the appellee, who, it may be, as has been suggested, has purged the fraud which it is charged he once committed; and, at the same time, it may hinder a perpetration by the other party of a double fraud.

Spence, J., delivered the opinion of this court.

The bill in this case states that on or about the 2d May, 1837, the complainant, in order to settle certain personal estate upon himself and family, as he might afterwards determine, executed a deed thereof to his brother, *Joshua Sedwick*, in whom he reposed implicit confidence, for the nominal consideration of $7,000, whereas no such sum, nor any other money, nor any other valuable consideration whatever, was paid therefor by the said *Joshua* or any other person, or received by the said *James* or any other person for him. The bill further charges, that in order further to execute the purposes aforesaid, and settle his property on himself and family as he might determine, the complainant and respondent executed another

agreement, under their hands and seals, dated 23d September following, whereby, in consideration of the sum of $10,000, alleged to be paid to the said *Joshua*, the said *Joshua* bound himself, his heirs, executors and administrators, in the penalty of $20,000, to convey to the said *James C. Sedwick*, or to him in trust for his child, or children, the aforesaid personal property, so as aforesaid conveyed to the said *Joshua*, as would appear, by Exhibit No. 2, filed with his bill. That in order further to effect the said object, the said respondent and complainant did also, on the 23d September, in the year aforesaid, enter into a further agreement, whereby, for the nominal consideration of $10,000, alleged therein to be due from the complainant to the said *Joshua*, the said respondent and complainant agreed that the said complainant should confess judgment on an alleged note of hand, dated 1st August, 1837, payable in thirty days after date, in favor of the said *Joshua*, at the earliest opportunity; on which judgment, the said *Joshua* agreed to have execution issued, and levied on the whole of complainant's property, real and personal, and buy the same, and then convey the whole thereof to the complainant, or to him in trust for his wife and children, &c. By which agreement, it was also expressly provided, that if the said *James C. Sedwick* finds it unnecessary to carry the execution into effect, the said *Joshua Sedwick* would enter the judgment satisfied, and the whole business should be annulled and void, and of no effect. For the faithful performance of which agreement, the parties bound themselves in the sum of $20,000, as appears by complainant's Exhibit No. 3, filed with his bill.

The bill further states, that afterwards, and in pursuance of said agreement, the complainant did, at the October term of *Calvert* County Court, in the year 1837, confess judgment for the aforesaid sum of $10,000, with interest from the 1st September, 1837.

The bill further alleges, that *Joshua Sedwick* departed this life on or about the 17th December, 1842; that letters testamentary were granted to *Henry B. Freeman* and *Jane E. Sedwick* by the Orphans Court of *Calvert* County, on the personal

estate of the said *Joshua;* that the said administrators have proceeded to have said judgment revived in their own names as administrators.

The bill charges, that the complainant never was indebted to the said *Joshua* in the sums mentioned in said deed or judgments; that at the time of the death of the said *Joshua*, the complainant was not indebted to him at all, nor hath he since become indebted to his administrators, in any sum whatever; that at the death of said *Joshua* he was indebted to the complainant; and that since the death of the said *Joshua*, his administrators, knowing the debt to be just, have paid the same.

The prayer of the bill is, that the administrators may be required, on their corporate oaths, to answer all the matters and charges in the bill, and to re-convey to the complainant the said personal property and the increase thereof, and have the said judgments entered satisfied, and the whole business annulled, and that subpœna and injunction be awarded to them.

The respondents' answer admits the execution of the several exhibits filed with the complainant's bill, numbered 1, 2, 3, 4 and 5, but deny that they have any personal knowledge of the motives, or consideration, which induced the parties to execute the deed of the 2d May, 1837, the complainant's Exhibit No. 1; and therefore cannot undertake to admit or deny that the consideration of $7,000 therein expressed, was paid, or that the use and trust thereof is therein truly expressed. But they have heard, and verily believe, that at and before the time of executing said conveyance, the complainant became largely indebted to divers persons, and executed said conveyance with the intent and design of defrauding and defeating his said creditors in the recovery of their just claims, and of securing his property to himself and his family.

The answers also admit the execution by the said *Joshua* of complainant's Exhibit No. 2, but charge that it was executed in furtherance of the same object, viz: of defrauding and defeating the creditors of said complainant, and of securing, more effectually, the property to the complainant and his children; the consideration therein expressed being merely

nominal, and no part thereof having at any time been paid by the complainant, or any other person, to the said *Joshua*.

The respondents also admit the execution of Exhibit No. 3, and charge that it was executed for the purpose of consummating the same fraudulent purposes, as would appear most evident by an inspection of the paper itself.

The respondents admit the recovery of the judgment against the complainant, as shown by complainant's Exhibit No. 4.

The allegations and averments thus set forth in the bill and answer, together with the proof given by complainant, present the cause upon which the Chancellor passed his decree, and which is now brought up for our review.

Does the complainant's bill, exhibits, and evidence, present such a case as should induce a court of equity to grant the relief asked by the prayer of the bill? If the allegations in the bill and the exhibits filed with it could leave a doubt on an impartial mind, of the fraudulent intentions of the parties to the agreement of the 2d May, 1837, surely the proof offered by the complainant himself must remove such a doubt; for it clearly shows the object and intention of the parties; it quadrates with the statements in the bill, and stipulations in the several exhibits filed with the bill.

The proof offered by the complainant in this cause is full and conclusive, that the agreement of the 2d May, 1837, between *Joshua Sedwick* and *James C. Sedwick*, was entered into to hinder, delay and defraud the creditors of *James*, and that *Joshua* and *James* were in *pari delicto*.

After a careful examination of the authorities, we are brought to the conclusion that courts of equity have held, and uniformly decided, that it was both the wisdom and policy of the law to withhold all aid or relief from parties in controversies between themselves, who stood strictly in *pari delicto*, which might or could tend to the consummation of agreements entered into in fraud of the law, or the rights of any person. *Mr. Justice Story*, in his *Commentary on Equity Jurisprudence*, vol. 1, p. 317, sec. 298, says: "The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving

the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established. Relief is not granted, where both parties are truly in *pari delicto*, unless in cases where public policy would thereby be promoted."

In the case of *Roberts vs. Roberts*, 4 *Eng. Exchq.* 448, the bill was filed by *George Roberts* for the purpose of setting aside a voluntary demise of certain hereditaments for a term of years, executed by the testator in his life-time to the defendant as a qualification to kill game.

At the hearing, the *Lord Chief Baron Richards* said: "I do not think the plaintiffs are entitled to a re-conveyance: the deed was executed maturely, the grantor knew the effect of it. There was no fraud at the time between the brothers; with respect to them the whole transaction was perfectly fair. But it appears by the evidence that the object of the deed was to give the defendant the appearance of a qualification, and that it was executed for no other purpose; that was a fraud on the law; and I cannot perceive what right that gives the plaintiffs to come into a court of equity to call for a re-conveyance." Vide *Doe dem. Roberts vs. Roberts' widow*, 2 *Barn.* and *Ald.* 367, where the same case was tried at law.

In *Balt vs. Rogers*, 3 *Paige's Ch. Rep.* 156, *Chancellor Walworth* says: "But I do not see how it is possible to give him (the plaintiff,) any relief in this case without overturning an established principle of law. Wherever two or more persons are engaged in a fradulent transaction to injure another, neither law or equity will interfere to relieve either of those persons as against each other from the consequences of their own misconduct."

In *Starke's Exec'rs vs. Little*, 4 *Randolph's Rep.* 372, *Judge Green* says: "It is a general rule that in *pari delicto potior est conditio defendentis*. But this rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation.

to engage in contracts, *contra bonos mores*, or violating the policy of the laws. There is no case in equity (says the Judge,) where relief has been given to the fraudulent grantor in such a case, except in that of *Austin vs. Winston*, 1 *Hen. & Munf.* 33, decided by a divided court."

In *James vs. Bird's Admr.* 8 *Leigh's Rep.* 510, where *Judge Parker* says, " There is no case in equity where any relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of *Austin's Admrs. vs. Winston's Exrs.* 1 *Hen. & Munf.* 33, decided by a divided court." Vide also *Wright vs. Wright*, 2 *Little*, 12.

In our opinion, the case of *Stewart vs. Iglehart*, 7 *G. & J.* 132, is conclusive in this.

DECREE REVERSED AND BILL DISMISSED.

The Swatara Rail-road Company *vs.* F. W. and J. C. Brune.—*December*, 1847.

The defendant, with others, signed an instrument of writing, promising to pay the *President and Managers of the S. and G. S. Rail-road Co.* the sum of $50 for every share of stock set opposite to their respective names, in such manner, &c. as should be determined by the said *P. and M.*, pursuant to an act of the General Assembly of *Pennsylvania*. A verdict was taken for the plaintiff for the value of shares subscribed for by the defendant, subject to the opinion of the Court, upon a statement of facts, with an agreement that the court might make such inferences from the facts, as a jury might. At the time of the subscription it was admitted by the statement, that the committee, who obtained it, represented to the defendant that *T. W. Canal stock* would be taken at par for any subscriptions to the *Rail-road Co.* The defendants resided in *Maryland*, and were ready to pay in Canal stock. *Held*, that an action for money had and received could not be maintained.

A party cannot agree upon a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, as that it was not in writing.

A plaintiff cannot recover in *assumpsit* against his own representation, upon a promise, the inducement to make which was founded upon such representation.

When a fact is admitted, of which written evidence alone was competent, and the admission is silent as to the nature of the proof, the court will not infer that it was verbal, nor that it was not within some one of the exceptions to the general rule.

A plaintiff ought not to disavow the act of his agent, in an action brought to enforce the contract made by such agent.

The courts of the States are the best expounders of the acts of their respective Legislatures.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, filed by consent to September term, 1844, by the appellants against the appellees. The case was tried upon the general issue.

The plaintiffs, at the trial of the above cause, read in evidence the Act of Assembly of the State of *Pennsylvania*, incorporating the plaintiffs, approved the 2d April, 1831, and also the supplements thereto, severally approved the 8th April, 1833, the 1st April, 1836, and the 20th March, 1838, subject, however, to the defendants' exception to their admissibility, for the purpose of making them liable under the subscription of the 10th November, 1840, if they were not legally liable, by reason of said subscription, at the time it was made.

The plaintiffs likewise proved that the charter and several supplements thereto, given in evidence, were accepted by them.

The plaintiffs then read in evidence, from their minute book, certain resolutions, viz:

Resolved, That the secretary be authorized to call in the first and second instalments on each share of the capital stock of this *Company*, on or before the last day of July next.

Resolved, That the secretary be hereby required to give public notice to the stockholders of this Company, that the third instalment of five dollars on each share will be required to be paid on the 1st September next. The fourth instalment of five dollars on each share, will be required to be paid on the 20th September next. The fifth instalment will be required to be paid on the 20th October next, payable to either of the officers of the *Company*.

Resolved, That the secretary be required to give public notice to the stockholders of this *Company*, that the sixth instalment of five dollars on each share, will be required to be paid on the 20th March, 1842. The seventh instalment of five dollars on each share, will be required to be paid on the 1st May next. The eighth instalment of five dollars on each share, will be required to be paid in June next. The ninth instalment of five dollars on each share, will be required to be paid on the 1st July next; and the tenth and last instalment of five dollars on each share, will be required to be paid on the 1st August next, payable to the president or treasurer.

It was agreed that the aforegoing are the resolutions referred to in the case stated as found in the book of minutes, in which it is stated, that said resolutions were passed at regular meetings of the plaintiffs, their president and managers; the first, at a meeting on 23d June, 1841; the second, on 2d August, 1841, and the third, on 2d March, 1842: and to show that calls for the instalments upon the subscriptions of stock were made, and entered on the minutes.

The plaintiffs, then, also read in evidence from a subscription book of the plaintiff, the following writing and signatures thereto:

"*Swatara and Good Spring Creek Rail-road Company, Subscription Book, Nov.* 10, 1840."

"We, whose names are hereunto subscribed, do promise to pay to the president and managers of the *Swatara and Good Spring Creek Rail-road Company*, the sum of fifty dollars for every share of stock set opposite to our respective names, in such manner and proportions, and at such times as shall be determined by the president and managers of the said *Company*, in pursuance of an Act of the General Assembly of this Commonwealth, entitled an Act to incorporate "*The Swatara and Good Spring Creek Rail-road Company.*"

"Witness our hands and seals, this 10th day of November, in the year, 1840."

The style of the *Company*, was changed by an act from the *S. & G. S. C. Rail-road Co.*, to that of the *S. Rail-road Co*

And also proved the signatures of the defendants thereto, by their co-partnership name of *F. W. Brune & Sons.*

The defendants then read in evidence, the following admissions and agreement:

It is admitted as part of the evidence in the above case, that the subscription of the defendants for stock of the plaintiffs, was procured by *William Donaldson*, then and still the president of the plaintiff, and *J. Wagenseller*, then and still the treasurer thereof, who came to *Baltimore* for the purpose of procuring subscriptions to said stock, after having been appointed by the plaintiffs a committee for that purpose. *And at the time the defendants subscription was procured, the said committee represented to the defendants, that Tide Water Canal Stock could be made available by the plaintiffs, and would be taken at par by it in payment of any subscriptions to the stock of the plaintiffs.* And that the defendants made their said subscription, relying upon said representation and promise, they having previously refused subscribing to said *D.* and *W.*, when no such representation and promise were made.

It is also admitted, that the defendants have always had and still have *Tide Water Canal Stock*, which at its par value, is much more than sufficient to pay the amount of the defendants subscription to the plaintiffs, and of which *Tide Water Canal Stock*, they have always been ready and willing, to transfer to the plaintiffs a sufficient quantity at its par value, to pay the amount of the defendants said subscription, and have so stated to the plaintiffs' attorney, whenever called upon for the said subscription; but their application and tender to pay their said subscription in *Tide Water Canal Stock*, which were made by them before suit was brought in this case, have been refused by the plaintiffs.

It is also admitted, that the first personal notice which the defendants had of the claim of the plaintiffs, was the letter of the plaintiffs' attorney, of the 29th of May, 1844, which may be read in evidence.

Baltimore, May 29th, 1844.

MESSRS. F. W. BRUNE & SON.

Gentlemen:—I am directed by the *Swatara Rail-road Company*, to collect from you, the amount of your subscription to their capital stock for five shares, at $50 each, $250; to which I beg leave to call your attention.

Very respectfully, your obedient serv't,

H. P. HEPBURN.

It is admitted in this case, that it appears from the minute book given in evidence, that the first election for officers, took place on the 2d of November, 1840, and that upon the same day the first meeting of the Company was held, when it was resolved, that the president appoint a committee, to prepare by-laws to be submitted to the next meeting; and that at the next meeting, which took place upon the 18th December, 1840, it was resolved, not to accept the by-laws reported by the committee until a future meeting, when a greater number of the board should be present.

That upon the 30th December following, at a meeting of the board, it was resolved to re-commit the by-laws to the committee, to report at the next meeting, and that it does not appear from the minutes that said committee ever reported upon the by-laws re-committed to them, nor does it appear by said book of minutes, that any by-laws were ever adopted by the *Company*.

And it is admitted, that it appears from the minutes that no other resolutions bearing upon this controversy were passed by the plaintiffs.

And proved that the plaintiffs had passed no other by-laws, and had no other minutes of their proceedings, having relation to this controversy, than those contained on the minute book, given in evidence by the plaintiffs.

It was also agreed, that only such parts of such minute book should be inserted in the record to be sent to the Court of Appeals, as should be agreed upon by the counsel of the parties.

The defendants proved that no notice of the calls for instalments upon the stock was given by advertisement, as required by the charter of the plaintiffs. The defendants also proved that the names subscribed in the subscription book given in evidence by the plaintiffs, from the name of *James Hepburn* to the end of said list of names, and including that of the defendants, were of persons residing in the city of *Baltimore*, who all subscribed their names therein in the city of *Baltimore*.

The testimony being closed, a verdict was taken by consent for the plaintiffs, subject to the opinion of the court as to the admissibility of the Act of Assembly, objected to by the defendants, for the reason stated in their objection, and with leave to either party to except to the opinion of the court, on admitting or rejecting the evidence thus objected to, and subject to the opinion of the court upon the whole evidence in the cause as above set forth, (including or rejecting the evidence excepted to, according as the court shall deem it admissible or not) and with power to the court to make such inferences from the facts given in evidence, as a jury would be authorized to make. And if the opinion of the court should be in favor of the plaintiffs, they should enter judgment on the verdict; but if for the defendants, they should set aside said verdict and enter judgment for defendants, with the privilege to either party to appeal from the opinion and judgment of the court, if it should be against him.

The County Court rendered judgment for the defendants, and the plaintiffs appealed to this court.

The cause was argued before Dorsey, Spence, Magruder and Martin, J.

By Brent and Wilkins for the appellants,

By Brune for the appellees.

Magruder, J., delivered the opinion of this court.

This is an action of assumpsit brought in *Baltimore* County Court by the appellants, and to recover the amount of the sub-

scriptions by the defendants to the company. Upon a verdict taken for the plaintiffs, subject to the opinion of the court, upon a statement of facts, and with an agreement that the court should make such inferences from the facts as the jury might, it was the decision of the court that the plaintiffs were not entitled to recover. We are called upon to decide whether this was a correct decision.

The claim of the plaintiffs is resisted upon various grounds, any of which, if sustained, will justify the judgment of the court below.

The subscription paper, which is the foundation of the action, is in these words: "We whose names are hereunto subscribed, do promise to pay to the president and managers of the *Swatara and Good Spring Rail-road Company*, the sum of $50 for every share of stock set opposite to our respective names, in such manner and proportions, and at such times as shall be determined by the president and managers of the said Company, in pursuance of an act of the General Assembly of this Commonwealth, entitled, an act," &c.

This paper has the signature of the defendants, and opposite to it is written "five shares," to recover the whole amount ($250,) claimed to be due in virtue of their subscription, this suit was instituted.

Among the admissions in the statements of the case, are the following: "The individuals who, at the time of obtaining the said subscriptions, were and still are the president and treasurer of the Company, came to *Baltimore* for the purpose of obtaining subscriptions to the stock, having been appointed a committee for that purpose. At the time the subscription of the defendants was obtained, this committee represented to them that *Tide Water Canal* stock could be made available by the plaintiffs, and would be taken at par in payment of any subscriptions to this Company. It is also admitted that the defendants made their subscription relying on said representation and promise, and further that they had refused to subscribe when no such representation and promise were made." The plaintiffs insist that they are entitled to demand payment of the amount

of subscription and money, and are not bound by the representation and promise of the committee. The defendants insist that they are not bound to pay, except in *Tide Water Canal* stock, and the suit is brought, not because of any refusal by the defendants to pay the canal stock, (which, it would seem, they were always ready to pay,) but to recover $250, due by them and recoverable in an action for money had and received, or upon an *insimul computassent*.

If the representation and promise which led to this subscription, which induced the defendants to agree to take five shares of this stock, (to be paid "in the *manner*, as well as in the proportions and at the times" to be determined by the president and managers of this Company,) had been made by an individual plaintiff in any suit, it would scarcely be contended that notwithstanding, and indeed, in violation of the promise and representation, parties making them could recover in any such form of action.

It has been said, indeed, that the promise by the defendants is in writing, and this is an attempt by parol proof to contradict and vary the contract. But it does not appear that if the defendants had been compelled to prove the undertaking and representation, they would have been obliged to resort to parol testimony. The fact, then, to be proved, is admitted, and admitted, perhaps, because of a knowledge that the defendants could have produced, if it was required, proof to which no such objection could be made. The evils to be apprehended from the admission of oral testimony to add or vary the written instrument, cannot be urged in this case. It is a part of the case stated not to be denied, that such representation and promise were made, and the court might legitimately infer, from the admission, that this promise and representation were the only inducements to (the consideration for) the promise by the defendants. A plaintiff cannot admit a *fact*, and then insist that there must be written proof of it, or it is no fact in the case.

No doubt it is a rule that written contracts are not to be added to or varied by oral proof; but it is well settled that

there are exceptions to this rule, and if this had been a controversy between two individuals, and the plaintiff admitted that he made this representation and promise, can it be questioned that those, who had to decide the controversy, might legitimately conclude, that such a case was within one or more of these exceptions, and that parol testimony was admissible to contradict or to avoid such a contract.

This misrepresentation and promise, however, was made by individuals, officers of the Company indeed, but who, in taking and procuring these subscriptions, were but agents of the plaintiffs, and *non constat* that they had any authority to make any such representation, or to enter into any contract in regard to the manner in which the subscriptions to the stock were to be paid. All of this would be entitled to consideration, if these subscribers were the plaintiffs, suing the Company for refusing to them the shares of stock, to which their subscriptions entitled them upon tendering in payment *Tide Water Canal* stock.

We are now to assume that this was a part of the contract. It may have been made a part of the contract without authority, and because of this the plaintiffs may not be bound to fulfil that contract; but surely the plaintiff ought not to disavow the act of its agent in a suit brought to enforce the contract made by that agent. The defendant is not bound to pay in gold and silver that which, it was the understanding of the parties actually contracting, should be paid in *Tide Water Canal* stock. So long, then, as the defendants are passive, do not claim a fulfilment of this contract, so long the plaintiffs ought not to complain while unwilling that the contract should be executed, as those who made it, must have understood it.

It will not be denied, that arguments entitled to consideration may be urged in opposition to this reasoning. We ought not, however, to forget, that the charter before us is the charter of a sister State, and its own courts are to be deemed the soundest expounders of its own charters and laws. No one can read the case of *James McConahy vs. The Centre and Kishacoquillas Turnpike Road Company*, 1 *Penn. Rep.* 426, without

the most entire conviction that in that State, this would be a defence in this action. Those, then, who are supposed to have a right to complain, became interested in this work with a knowledge of the charter, and of the interpretation of it in their State; that of such a defence they might have availed themselves, and therefore they have no right to complain that others who have been deceived by the representations and promises of the "committee," should claim the benefit of the decisions of the Supreme Court of *Pennsylvania*.

Without then examining other objections to the plaintiffs' recovery in this case, this judgment is affirmed.

JUDGMENT AFFIRMED.

THE FARMERS BANK OF MARYLAND *vs.* JAMES IGLEHART.—*December*, 1847.

A. devised the dividends in certain bank stock to his widow for life, with remainder to his children, and appointed *D.*, one of his sons, executor. He assented to the bequest, paid the dividends to his mother, and assigned his interest to *J.* Before the assignment, *D.* was indebted to the bank. The stock remained in the name of the testator, after the widow's death. The assignee, *J.*, applied to the bank to permit *D.* to transfer the stock assigned to him. The debt of *D.* not being paid, the bank refused. *Held*, that as by the charter of this bank, all debts actually due to it by a stockholder offering to transfer, must be discharged before such transfer be made, the bank was not obliged in this case to permit the transfer.

The assignee of *D.* was precisely in the predicament of his assignor, under whom he claimed as legatee.

Dealing with a stockholder of a bank, with reference to its stock, a purchaser takes an equitable assignment, subject to the rights of the bank under its charter, of which the assignee is bound to take notice.

That this was a case in which the legal title to the stock, which otherwise would have been in the executor, had become extinguished by his consent to the legacy, and vested in the legatee, *D.*, and where the assignee claimed not of the executor, but of the legatee.

Where the debt due a bank, which, by its charter, is not bound to permit a transfer of its debtor's stock, until his debts are paid, is barred by limitations at law, it does not lose its lien on the stock. The debt is not extinguished, though its remedy may be barred, and the lien follows the debt.

If the debt were extinguished, the lien would be lost.

APPEAL from the Court of Chancery.

The bill in this case was filed by the appellee against the appellant and *David Ridgely*, on the 10th May, 1845, and alleged, that *Absalom Ridgely*, by his last will, gave and bequeathed to his wife, *Ann Ridgely*, during her life, the dividends which should accrue or become due on one hundred shares of stock of the *Farmers Bank of Maryland;* and subject to said bequest, and other bequests and devises contained in said last will; in relation to other parcels of his estate, he devised and bequeathed all the rest and residue of his estate, both real and personal, to be equally divided amongst his children, *John Ridgely*, &c. That letters testamentary thereon were granted unto *John* and *David Ridgely*, the executors therein named, who possessed themselves of the personal estate of their testator, and assented to the bequests in said last will and testament, whereby your orator is advised that said *David* acquired a vested interest in remainder, expectant on the death of the said *Ann*, the widow, in one-eighth part of said stock; that the said *Ann* received the dividends on the said stock until her death, which happened in 1845; that the said *John*, one of the executors, is dead, leaving the said *David Ridgely* surviving him; that the said *David*, on the 20th July, 1829, for valuable consideration, assigned his interest in said stock to complainant by deed, who, on the death of the said *Ann*, became entitled to demand a distribution of said stock, amongst the residuary legatees aforesaid, and a transfer of one-eighth part thereof unto him as assignee of the said *David*, and your orator has accordingly required the said *David*, as surviving executor, to make distribution and transfer thereof as aforesaid; that on application at the banking-house of the *P. D.* and *Co.* of the *Farmers Bank of Maryland*, for the purpose of having a transfer made as aforesaid, your orator and the said *David* have been informed that the said *F. B.* refuses to permit any such transfer to be made, and claims and insists on a right to appropriate said bank stock to the payment of some debt or debts which said bank pretends are due and

owing from the said *David* to the said bank; that at the time of taking said assignment, he had no notice whatever of the claims now pretended by said bank, nor any cause whatever for supposing that the said *David* had not full right and authority to make the assignment to him as aforesaid; that no proceeding was ever taken by said bank, for the purpose of subjecting the interest of said *David* in said stock, to the payment of the claims now pretended against him, nor did the said bank, at, or at any time before, or for many years after the date of said assignment, notify said *David* or your orator of the existence of any lien on or claim against said *David's* interest in said stock, on account of any claim of said bank against him. And on the contrary, said stock was permitted to remain on the books of said bank in the name of said *Absalom Ridgely*, or of his executors aforesaid, without any thing which could arouse suspicion, or lead a purchaser to question the right of said executors to dispose of said stock, or of any of the legatees of said stock, to dispose of his or her interest therein; and your orator is therefore advised, that if the said bank ever had a lien or claim on said stock, which is denied, such lien or claim ought to be adjudged, lapsed or forfeited by the negligence and default of said bank as aforesaid; and that your orator, as against said bank, ought to be treated and protected as a purchaser of said interest, for valuable consideration, and without notice of the title now pretended against him. Your orator denies the existence of any debt due from said *David* to said bank, which could at any time have affected such interest as said *David* had in said stock at the date of said assignment, and if such debt ever existed, he insists, that from the laches of said bank it ought to be presumed to have been satisfied, or otherwise held to be barred by limitations.

And your orator further charges, that the estate of the said *Absalom Ridgely* was valuable, and in distributions of parcels thereof heretofore made, the sum of $1,000, described in said last will as due from the said *David* to the testator, and which is by said will directed to be treated as an advance-

ment to said *David*, has been fully accounted for and satisfied. He further charges, that some time in the year 1829, the said *D. R.* applied for and obtained the benefit of the insolvent laws, and that one *James Shaw*, then of the city of *Annapolis*, but since deceased, was appointed his trustee, and qualified accordingly; but no trustee has been appointed since the death of the said *Shaw;* that he is not aware of the existence of any property of said *D.* to which a trustee could entitle himself; he is advised it is not necessary for the purposes of this suit, that another trustee should be appointed.

Prayer, that the said bank may be compelled to permit the said *D.* to transfer unto your orator his just proportion of the aforesaid bank stock, and for other relief, &c.

The will of *A. R.* was exhibited with the bill, and also the assignment from *D. R.* to the complainant, viz:

For value received, this 20th July, 1829, I do hereby assign and transfer unto *James Iglehart*, all my right and interest in and to certain shares of the capital stock of the *Farmers Bank of Md.* which were devised by my late father, *A. R.* to his wife, for and during her natural life, and I do hereby bind myself to do and perform all and every act which may be necessary for the transfer of the same, whenever they may vest in me in possession. As witness my hand and seal, the day and year above written.

DAVID RIDGELY. (Seal.)

Witness, *Jas. H. Iglehart.*

The bank answered the bill, and claimed as creditor of *D. R.* to hold his interest in the stock, under its charter.

The cause was submitted to the Chancellor, on bill, answer and general replication.

It was admitted that the complainant was a purchaser for a valuable consideration, as shown by his exhibits; that the stock mentioned in the bill continued to stand in the name of the testator until shortly after the death of the widow, *Ann Ridgely*, when seventy-three shares of said stock were trans-

ferred by the said *David Ridgely*, the surviving executor, to several of the legatees, the remaining shares standing in the name of said *Absalom Ridgely*, because of the refusal of the bank to permit a transfer thereof, and in consequence of such refusal, this bill was filed; that the exhibits filed by the *President, Directors & Co.* with their answer, are to be treated as fully proved, and as evidence of the indebtedness on the part of *D. R.* to them, as therein shewn, but this admission shall not prevent the complainant from insisting that those debts are now barred by the statute of limitations, lapse of time and laches, and that they do not show such indebtedness as the *P. D. & Co.* could have enforced, and can enforce against the bank stock in controversy, to the prejudice of the complainant; that the complainant and the *P. D. & Co.* are co-creditors of the estates of *Beale M. Worthington*, in which their claims are filed.

It is also admitted, that the complainant was a stockholder of the *Farmers Bank of Maryland*, as stated in the answer. The admission hereinbefore made of transfers of parcel of said stock, is made subject to the objection on which complainant insists, and is to be at liberty to insist that such fact is not admissible in evidence, under the pleadings in the cause.

The debt of *D. R.* to the bank originated in 1824, and judgments at law had been recovered against him.

On the 15th November, 1845, the Chancellor (BLAND) decreed that the defendant, *D. R.* as surviving executor of *A. R.* deceased, forthwith transfer on the books of the *P. D. & Co.* of the *Farmers Bank of Maryland*, unto the complainant, twelve shares of the capital or joint stock of said bank, now standing on said books in the name of the said *A. R.*; and that as soon as conveniently may be, the said defendant, *D. R.* pay unto the complainant *one-eighth part of the value or net proceeds of sale, to be made of four other shares of said stock*, the same constituting one-eighth part of one hundred shares of the said capital stock, now standing on the books of said bank in the name of the said *A. R.*

And it is further adjudged, ordered and decreed, that the

said *P. D. & Co.* of the *Farmers Bank of Maryland*, at such time or times as the said *D. R.* may require, do produce the proper transfer or other book or books of said bank, and do permit the said *D. R.* to make therein such transfer or transfers, or other entry or entries, as shall or may be proper or necessary to carry into effect this decree, with costs, &c.

From this decree, the bank appealed.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By RANDALL and MCMAHON for the appellants, and

By ALEXANDER for the appellees.

MARTIN, J., delivered the opinion of this court.

It appears in this case, that *Absalom Ridgely*, by his will, executed on the 14th February, 1816, and admitted to probate on the 24th August, 1818, bequeathed to *Ann Ridgely*, his wife, for life, the dividends which should accrue on one hundred shares of stock, standing in his name on the books of the *Farmers Bank of Maryland;* and subject to this bequest, and other bequests, in relation to different portions of his property, he devised the residue of his estate to be equally divided among his eight children.

It is also shown by the record, that *David Ridgely*, one of the children of the testator, as well as one of his executors, by an assignment of the 20th July, 1829, transferred his interest in the shares of stock, devised to him by his father, to the appellee for a valuable consideration, and stipulated to perform any act that might be necessary for the transfer of the stock, when it vested in him in possession by the death of the tenant for life.

Mrs. Ann Ridgely, the tenant for life, having died in April, 1845, an application was made at the bank for a transfer of this stock to the appellee, as the assignee of *David Ridgely*, and the bank having refused to accede to this application, claiming under their charter a lien on the stock for debts due

to them by *Ridgely*, and subsisting prior to the assignment to *Iglehart*.

This bill was filed on the 10th May, 1845, to coerce from the apellants a transfer of the twelve and a half shares of their stock, to which *D. Ridgely* was entitled as legatee, under the will of his father.

It being perfectly apparent from the pleadings and admissions in the case, and conceded by the counsel for the appellee, that in 1845, the period at which a demand was made upon the bank for a transfer of this stock, the title to it had become absolutely vested in *Ridgely*, by the assent of the executors to the legacy, and the termination of the particular estate. The principal question presented for our consideration, is, whether the appellants were authorized by the provisions of the charter incorporating the bank, to assert a lien upon the stock of their delinquent stockholder, in opposition to the equitable interest acquired by the appellee, under the assignment of the 20th July, 1829.

By the 20th section of the Act of Assembly, incorporating the *Farmers Bank of Maryland*, 1804, ch. 61, it is provided:

"That the stock of the *Farmers Bank of Maryland*, may be transferred by the holder, in person or by power of attorney, at said bank, or at the *Branch Bank* at *Easton*, but all debts actually due to the company by a stockholder offering to transfer, must be discharged before such transfer shall be made."

The power conferred upon the bank by this clause of the charter, to withhold a transfer of stock, until the proprietor and holder of the stock has satisfied all claims actually due to the company, is too clear to be questioned, and, in this respect, the predicament of the appellee is precisely that of *David Ridgely*, under whom he claims as legatee. For dealing with a stockholder of the company in reference to his stock, he is held to have taken his equitable assignment subject to the rights of the bank, under the act of incorporation, of which he was bound to take notice. *Union Bank vs. Laud*, 2 *Wheat.* 393. *Brent vs. Bank of Washington*, 10 *Pet.* 616.

We think, therefore, in this aspect of the question, the bank committed no default in refusing the transfer of the stock, as required by the appellee.

This is not the case of a bank refusing to permit an executor, who had not assented to a legacy, to transfer stock, for the purpose of executing the provisions of the will, as in *Franklin vs. The Bank of England*, 1 *Rus. Ch. Rep.* 574. But a case in which the legal title to the stock, which otherwise would have been in the executor, had become extinguished by his consent to the legacy, and had vested in the legatee; and where the appellee, who demanded from the bank a transfer of the stock in question, claimed as the assignee, not of the executor, but of *David Ridgely*, as legatee.

It was conceded that in 1845, when the bank, upon the demand of the appellee to direct this stock to be transferred, asserted its lien, the debts due to the company by *Ridgely*, were barred by the statute of limitations, and that the plea of the statute would have been a complete answer to any action that might have been instituted for their recovery in a court of law. And the counsel for the appellee has contended, that as the debts due to the bank were extinguished by the operation of the statute of limitations, the lien was necessarily lost and destroyed. If the proposition asserted by the counsel, that the debt is extinguished, be true, it would follow as a necessary consequence that the lien would be lost; for there would be no existing claim to which the lien could be attached. But this is not the rule. It is an established principle, that the statute of limitations operates only to bar the remedy, and does not extinguish the right or cause of action.

This is the language of the Court of Appeals, in *Oliver vs. Gray*, 1 *H. & G.* 216, where they say:—According to all the cases the debt is considered as not extinguished. The statute of limitations is regarded as operating upon the remedy only, and not as extinguishing the debt.

In *Brent vs. The Bank of Washington*, 10 *Pet.* 596, suits had been instituted by the Bank for the recovery of the notes, in reference to which the lien of the defendants in error was

asserted and maintained, and a verdict rendered for the defendants exclusively on the plea of the statute of limitations. One question propounded for the consideration of the court was, whether these claims were not extinguished, and the lien in consequence destroyed. On this question the court says: After referring to the rule announced in the *United States vs. Donnelly*, 8 *Pet.* 361, we cannot take this case out of this established rule; the legal remedy is barred, but the debt remains as an unextinguished right; and the Bank, when called into a court of equity, may hold to any equitable lien or other means in their hands till it is discharged.

In *Spears vs. Heartly*, 3 *Esp. P.* 81, a case recognized in 1831, in *Higgins vs. Scott*, 2 *Bar. & Adolp.* 413, *Ld. Eldon*, when examining this subject says: "If what has been stated by the defendant's counsel be law, that the debt is discharged by the operation of the statute of limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only; I am of opinion that though the statute of limitations has run against the demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien." The same doctrine is maintained in *Higgins vs. Scott*, 2 *Bar. & Adolp.* 413, and must be considered as too firmly settled for dispute.

It follows from the views thus expressed, that we regard the decree of the Chancellor as erroneous; and a decree will be signed, reversing his decree, and dismissing the complainants' bill.

DECREE REVERSED AND BILL DISMISSED.

Roderick Dorsey *vs.* Henry Wayman and others.—*December*, 1847.

W. & H. agreed in writing, signed by them, that *W.* had sold to *H.* "all that part of a tract of land, called *R.*, lying adjoining the turnpike road near where *P.* now lives, at, &c.—we having this day settled our other business without including the sale for this land, we make this memorandum to save trouble in case of accident to either of us." *Held:*

1st. That this agreement contained no sufficient description of the land sold; the bounds and quantity are both uncertain and indefinite, and could not be enforced any further than as admitted by *H.*

2d. That claims due *H.* long anterior to the above settlement, must, under the circumstances, be considered as closed.

Where a creditor has two claims against his debtor, and a payment made was designed to be on account of one, but was credited in fact to the other, with the consent of the debtor, he cannot afterwards, in the absence of any agreement to change the application of the money, insist, there was error in the credit.

Where a party voluntarily pays money, not being ignorant of the facts on which his liability depended or was asserted, though the demand is invalid, he cannot claim to apply such payment to another demand which his creditor has against him.

Where three parties were responsible as sureties upon a promissory note, and upon a difference arising as to the extent of their several liabilities, it was agreed that the note should be renewed—one being maker, and the two others endorsers; the latter endorser being security for the first. The executor of the maker having paid the note, omitted to present his claim to such last endorser until the estate of the *first* endorser, which was amply sufficient to pay his liability, was settled up; and when no recourse could be had against it.—*Held*, that the latter endorser was discharged.

The last endorser on a promissory note, who was the security for a prior endorser, does not lose his claim against his immediate principal, by continuing to endorse renewals of the note, which fell due after his principal's death.

Appeal from the Court of Chancery.

The bill in this cause was filed by the appellant on the 7th September, 1837, and alleged that in 1818, *William Hobbs, of S. &c.* deceased, being seized and possessed of a parcel of land, agreed with *Henry Wayman* to sell him the same at and for the price of $20 *an acre*, and the said *Wayman* agreed to pay the purchase money for said land in annual instalments of $100; that *Wayman*, shortly after said agreement

entered into possession, and ever since has held and used the same. That the precise quantity contained in said parcel was unknown at the time of the agreement, but has since been ascertained to be 30 *acres*, 1 r. and 20 sq. p. so that the purchase money therefor amounts to the sum of $607 50; that the said *W.* has paid the sum of $67, on account of said purchase, but that the residue remains due; that *W.* was also indebted unto the said *Hobbs*, deceased, $843, with interest from the 23d June, 1827; that since the death of said *H.* the said *W.* has paid to him as executor of said *H.* several sums of money on account, which are all endorsed on said note, and that the residue of the principal and interest secured by said note is still due.

That some time in the year 1823, *W.* and *Richard Dorsey*, were liable as endorsers on a note drawn by *Doctor Warner Hobbs*, for the sum of $600, which was discounted for accommodation of the said *Warner Hobbs*, at the *F. C. Bank*. That *W. H.* died insolvent, and *William Hobbs, of Samuel*, having administered on his estate, it was agreed between the said *W. H.* and *Richard D.* and *W.* that the accommodation should be continued on a note to be drawn by said *Hobbs*, and endorsed by *Richard D.* and *W.* and that *D.* and *W.* should be responsible for the deficiency which should remain due after the application of proportionable dividends of the personal and real estate of *Warner H.* to the reduction of said note. That a note was accordingly drawn, endorsed and substituted as aforesaid, and renewed from time to time, the discounts on every renewal were paid, and certain sums were paid, in reduction of the principal, and on the 23d May, 1831, the sum of $375 56, being the entire balance due on said note, was paid into the *F. C. Bank*, by complainant as executor of the said *William Hobbs*. That some time after the agreement last aforesaid, the name of complainant was substituted as endorser on said note, in place of the name of the aforesaid *Richard Dorsey*, whereby the said *R. D.* was discharged from his liability, but the liability of said *W.* remained: that the said *W.* is largely indebted unto the estate of the said *Hobbs*, for his moiety of said

note and interest: that *William Hobbs*, has lately departed this life leaving complainant his executor, and devised the residue of his real and personal estate to *Rachel Dorsey*, then the wife of complainant, but since deceased, &c.; that *W.* pretends that he has large unsettled demands against the said *William Hobbs*, deceased, and which he insists ought to be set off against complainant's claims as aforesaid. Complainant does not admit the right of said *W.* to any credits in addition to those which are herein before mentioned, excepting that there has been received from the estate of *Warner Hobbs*, on account of the debt originally due by him, as is herein before stated, the following dividends of real and personal estate; that is to say, &c. that it is pretended by said *W.* that some of the aforesaid demands of your orator—and particularly the last—are barred by limitations. On the contrary, it was distinctly admitted by the said *W.* at the time of making the agreement aforesaid for a reference, that the claims aforesaid were not barred; and the said *W.* did expressly undertake and promise to pay whatever sum should be ascertained to be due to your orator as aforesaid; that said admission and undertaking were made some time in the year 1836. Prayer for subpœna and answer, and for other and further relief.

With this bill were filed:

EXHIBIT C.

$843. Twelve months after date, this, my note, shall oblige me, my heirs, executors or administrators, to pay, or cause to be paid, unto *William Hobbs, of Samuel*, his heirs or assigns, the sum of $843, value received, with interest from date. As witness my hand and seal this 23d June, 1827.

Witness, *Rod'k Dorsey.* HENRY WAYMAN, [*Seal.*]

Received Nov. 2d, 1830, $98 88 on the within. R. D.
Received 16th May, 1831, $500 on the within. R. D.
Received 22d October, 1831, $250 on the within. R. D.

EXHIBIT D.

Dear Sir:—I have some *Baltimore notes*, which I gave *Nancy* to take care of: as she has gone up to your house to-

day, I can't send them, not knowing where she has put them. I send the endorsement on the blank paper for the bank, and agree to sustain one-half the loss on the note, in case the estate on being settled up should be insolvent. ROD'K DORSEY.

HENRY WAYMAN.

Monday Morning.

Whereas, *Col. Dorsey* was one of the endorsers of *Warner Hobbs, Esquire*, and it is the intention of *Richard Dorsey*, to pay one-half of the deficiency, in case there should be a deficiency in *Warner Hobbs'* estate; I shall hold myself accountable with the said *Dorsey*, to an equal proportion with *Mr. William Hobbs.* HENRY WAYMAN.

August 4th, 1823.

Henry Wayman's answer admits the death of *William Hobbs;* that the complainant is his executor, and that the co-defendants are his devisees and heirs at law. He denies that he ever did purchase or agree to purchase of the said *Hobbs*, the land as stated in the said bill and *Ex. A*, and he further denies that the memorandum of an agreement, complainants' *Ex. B*, which it is admitted is signed by this defendant, refers, or was intended to refer to the land as plotted and described in the complainant's *Ex. A*, of which this defendant denies all knowledge or notice. But, he admits, that some time before 1827, he sold to one *Haskell*, a parcel of land adjoining the land of the said *William Hobbs;* that said *Haskell* intending to build on said land thus purchased by him, did by mistake, erect his dwelling upon the land of the said *Hobbs*, being a small parcel, lying adjoining the turnpike road, and called "*Range Declined*," that finding his mistake, the said *Haskell* contracted to purchase of said *Hobbs*, this parcel of land, at $20 00 per acre, that afterwards, said *Haskell* moving off and abandoning his purchase of this defendant, and of said *Hobbs*, this defendant agreed to take the contract, made by said *Haskell* with said *Hobbs*, and to purchase this parcel of land of the said *Hobbs* at the price aforesaid per acre, the quantity then being unascertained, as stated in complainants' Ex. B.

That afterwards, the same was ascertained to contain five acres and eighteen perches, and that it was to this five acres and eighteen perches, and to it alone, that the said memorandum of an agreement, Ex. B refers; that for the balance of this purchase, after deducting the $67 paid for said *Hobbs* by this defendant, and interest, this defendant admits he is indebted to the complainant.

That the lands claimed by the complainant in his bill and Ex. A, with the exception of the part thereof, five acres eighteen perches aforesaid, were purchased by this defendant's father, *John Wayman*, about 1782, and that since 1792, this land, with the exception aforesaid, came into the possession of this defendant, by the death of his said father, and has ever since been quietly and exclusively used, held, occupied and enjoyed, under enclosures, as this defendant's own absolute property, and this defendant relies upon this long and uninterrupted possession, by enclosures, for more than forty years as a bar to any claim thereto set up by the said bill.

He admits the execution of the single bill, complainant's Ex. C, and the credits; and alleges that defendant has not received credit thereon for sundry sums of money, as per, &c. paid by this defendant for said *Hobbs*, on account of said *Hobbs'* note, for all of which credits, it was agreed by said *Hobbs* this defendant should be credited on his single bill aforesaid, which credits this defendant insists should now be made. He denies that he ever was an endorser of a note of *Dr. Warner Hobbs*, or in any manner liable on his account, as alleged in the said bill. He admits that he did sign the agreement in writing, the complainant's Ex. D. But this defendant denies that the said agreement applies, or was intended to apply to the note drawn by *W. H.* and endorsed by *Roderick D.* and this defendant, the complainant's *Ex. F.* The circumstances and facts of that matter this defendant avers were as follows:—

Dr. Warner Hobbs, a son of said *W. H.* was drawer of a note, and said *W. H.* and *Richard D.* endorsers thereon; that after the death of *Warner H.* there was some controversy between the said endorsers, as to the extent of their respective

liabilities thereon, when it was agreed between them that they should share in equal parts any loss they should thereby sustain; and in order to keep up the negotiation until the loss could be ascertained, it was agreed that *William H.* should be the drawer of the note, *Richard D.* become first endorser, and this defendant agreed to become the second endorser, and to be security for *Richard D.* to the extent of what he should be bound to pay under said agreement, in case the said *Richard D.* should fail to pay the same, and in no other event whatever; that the said *Richard D.* afterwards died, leaving large and valuable estates, real and personal, more than adequate to the payment of all his debts and liabilities; that if any thing be due on account of said agreement, it might and could have been received from his estate. And defendant, until the filing of this bill, believed the whole matter was adjusted,—and especially as the said *Roderick D.* assumed the place of the said *Richard D.* on the renewals of the said note, after the death of the said *Richard D.* This defendant denies that he ever was liable on the said note, Ex. F, in any other manner than as second endorser thereon. He denies that the drawer of said note, or the first endorser thereon, has any claim whatever on him; that the said *William Hobbs* left ample estate to pay all his debts.

This defendant, further answering, avers, that he never did receive any notice of the refusal of the drawer of said note, Ex. F, to pay the same, or of this defendant being held to pay the same or any part thereof until the filing of this bill, and this defendant does plead and rely upon the statute of limitations of this State, as a full and complete bar and defence to any right of action which may arise on the said note, complainant's Exhibit F, or on the said agreement, complainant's Exhibit D, against him.

And this defendant denies that he is indebted to the complainant in any manner whatever, than for the balance due on the purchase of the said five acres and eighteen perches of land, at the price of $20 an acre, as aforesaid, and for the balance of his said single bill, and he pleads and relies upon the statute

of limitations of the State of *Maryland* aforesaid, as a complete bar to all other pretended claims set up in said bill.

"Memorandum of an agreement between *William Hobbs, of Samuel*, and *Henry Wayman*, sheweth, that the said *William Hobbs, of Samuel*, hath sold unto the said *Henry Wayman*, all that part of a tract of land, called "*Range Declined*," lying adjoining the turnpike road near where *Woodward* now lives, at $20 per acre, payable $100 annually, with interest; the date of the sale to be fixed by a reference to papers in *Mr. Wayman's* possession—the sale being made some time past. We, having this day settled our other business without including the sale for this land, we make this memorandum to save trouble, in case of accident to either of us.

Witness our hands this 23d June, 1827.

Signed, WM. HOBBS, OF SAM'L,

Witness, *Rod'k Dorsey.* HENRY WAYMAN."

On above is endorsed as follows:

"I hereby acknowledge that *Mr. Henry Wayman* paid my note to *Zachariah Roberts*, dated 7th April, 1818, for $67, on the within land. Signed, WM. HOBBS, OF SAM'L.

November 29th, 1839."

COMPLAINANT'S EXHIBIT F.

"*June 16th*, 1829.

"$340. Sixty days after date, I promise to pay to *Roderick Dorsey*, or order, $340, for value received—negotiable at the *Frederick* County Bank, and payable at *George Baer's* house, in *Fredericktown.* WM. HOBBS, OF SAM'L."

"Endorsed, *Roderick Dorsey, Henry Wayman.*

Note, ...	$340 00	
Protest, ...	3 15	
1 year, 9 months and 5 days interest,	35 98	
		$379 13
Deduct cash in bank, . . .		3 57
		$375 56

Received of *Roderick Dorsey*, executor of *William Hobbs, of Sam'l*, the above sum. H. DOYLE, *Teller.*

May 23d, 1831."

A commission to take proof was then issued, under which a great variety of testimony, in relation to the details of the accounts between the parties, was taken; and the Chancellor passed a decree to account generally.

The auditor reported:

Statement No. 1, in which he charged *Henry Wayman*, in account with *Roderick Dorsey*, executor of *William Hobbs, of Samuel*, deceased, with his single bill, of 23d June, 1827, as per Exhibit C, $843; which, after allowances for payments and charges for interest, left due by *H. W.* $278 01, as of 10th March, 1845.

Statement No. 4 related to the same single bill, but allowed further credits for payments, leaving a balance due of $77 35.

Statement No. 2 charged *H. Wayman* with the 5 acres and 18 perches of land and interest, $72 71.

Account A charged *H. Wayman* with the two balances of $77 35 and $72 71, and interest—amounting to $150 06.

To these accounts, both parties excepted.

On the 19th March, 1845, the Chancellor (BLAND) ratified Account A and dismissed the bill, as against all other defendants than *Wayman*.

The complainant appealed to this court.

The cause was argued at December term, 1846, before ARCHER, C. J., CHAMBERS, SPENCE and MARTIN, J.

By ALEXANDER for the appellant, and

By WIRT and RANDALL for the appellees.

ARCHER, C. J., delivered the opinion of this court.

The agreement for the sale of land, called "*Range Declined*," contains no sufficient description of the land sold. It is described, as being all that part of "*Range Declined*," lying adjoining the turnpike. Thus, the contract gives only the line adjoining the turnpike; what are the other courses and distances of the land sold, cannot be known from the agreement itself, or by any thing referred to in it. Such an agreement,

we apprehend, we could not enforce further, than as admitted by the defendant. To this extent, the Chancellor has decreed against the defendant, and he concedes, that to this extent, the decree is not objectionable. Independent of the above consideration, the evidence as to the bounds and quantity of land sold, is uncertain and indefinite.

As the *second* ground of appeal, it is conceded by the answer, that the sum credited to the single bill, was paid on the note; but, that *Hobbs* had agreed that it should be credited on the single bill.

Exhibit No. 2, filed with the answers, shows, that the sum in dispute was paid on the note, and there is no evidence of the existence of any such agreement to change the application of the payment. When the amount was paid by *Wayman*, it is not pretended he was ignorant of the facts upon which his liability depended, and if the claim was legally invalid, having *voluntarily* paid the amount in controversy on the note, he cannot transfer the amount from the note to the single bill.

We cannot perceive there is any other credit than the above, and what has been allowed on the single bill, established as against the claim of the complainant on the single bill. The order of *Steene*, in favor of *Wayman*, was long anterior to the settlement recognized by the agreement of 1827, and must in the present state of the pleadings and evidence be considered as closed.

The claim No. 3, we do not think is established. The agreement between *Richard Dorsey* and *Wayman*, is unintelligible. The answer avers, that *Wayman* was only a security for *Richard Dorsey*, that he would pay one-half the loss which might be sustained.

William Hobbs and *Richard Dorsey*, having agreed each to sustain one-half the loss—the only testimony we have, in relation to the agreement under which the note of *Wm. Hobbs* was originally discounted—is proved by the declarations of *Wayman*, made evidence by the complainant's 12th Interrogatory, filed with the first commssion. This evidence sustains the answer, and proves that *Wayman* was only the security of *Richard*

Dorsey in the endorsement; that *Dorsey's* estate was amply sufficient to have paid his liability, yet, that no claim was presented until after *Dorsey's* estate was settled up, when he could have no recourse for indemnity against *Dorsey's* estate.

Believing this to be the only evidence operating on the case, and assuming it to have been the real transaction between the parties, we do not think that *Wayman* was answerable to *Hobbs'* estate for the deficiency, if it be true, as averred in the bill, that *Richard Dorsey* was discharged from his liability.

Wayman's consent to *Dorsey's* discharge is not, we think, indicated by his continued endorsements and payments of discounts. The bank was no party to the agreement by which he became security for *Richard Dorsey*, and, as regards the bank, he was bound as an endorsee from time to time, to provide for his note. In this way, the renewal of the notes may be accounted for, without attributing such renewal to any consent on his part to *Richard Dorsey's* discharge.

A decree will be passed, reversing the decree of the Chancellor, and with costs to appellant; directing payment for the balance due on the land admitted by the answer to have been purchased; disallowing the credit of one hundred dollars, which has, by the Auditor, been allowed to the single bill, and disallowing the claim designated as No. 3.

DECREE REVERSED WITH COSTS AND DECREE FOR APPELLANT.

The Baltimore and Susquehanna Rail-road Co. *vs.* Samuel Faunce and J. D. Passmore.—*December*, 1847.

A party cannot recover money, voluntarily paid, with a full knowledge of all the facts, although no obligation to make such payment existed.

A party making a payment in the mistaken belief, that the sum paid was the true balance appearing due from an account before him, and not noticing a deduction therefrom, paid a larger sum than he intended, may recover the excess.

A payment cannot well be said to be voluntary when it is made in consequence alone of a false view of the facts.

The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights.

Where the agent of a rail-road company agreed to pay only what the engineer of the company certified, and supposed he was paying no more, while in fact he did pay more to a contractor, the company may recover the sum erroneously paid.

Where the defendant's claim was $2,436 10, and his agent intending to pay that sum, erroneously and unconsciously paid $3,306 10, which payment was made up of $1,006 in small notes illegally issued by the plaintiff, and $2,300 10 in current money, the defendant received the whole as money, and upon immediate demand, refused to return the small notes, or the overpayment. In an action for money had and received, the plaintiff may show the error; the defendant cannot defend himself upon the ground that the small notes were illegally issued.

The law properly withholds its aid when parties ask to enforce an illegal contract; but this is not such a case. The plaintiff does not ask to enforce an illegal contract, nor recover against the defendant for refusing to violate the law. The action is brought to correct a mistake.

Where a municipal corporation authorized one of its inhabitants to issue small notes as currency, in their name, but for his benefit, and upon his responsibility; and he afterwards, by will, directed his estate to be sold *for the payment of such notes*, the notes being issued in violation of law, a bill, filed to coerce the sale, was held to be an attempt to enforce a void contract, and dismissed.

In an action for money had and received, any thing received by the defendant as money, will entitle the plaintiff to recover; as a bond, a note, a credit in account, land received and acknowledged as money, and a mixed, erroneous, payment of legal and illegal notes—there being circumstances to show that the defendant received money for the illegal notes.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, brought by the appellants against the appellees. The defendants pleaded the general issue.

1ST EXCEPTION. The plantiffs offered in evidence the contract between the appellees and the *York and Maryland Line R. R. Co.* for work, to be done by the said appellees under said contract, and the final estimate thereof by *Isaac Trimble*, engineer thereof for the time being, viz:

For money paid by them, ...	$ 129 27
For work on bridge, sect. 65, . . .	12,586 25
For work on graduation, sect. 65, . . .	11,926 56
	$24,642 08

From the graduation work, the estimate deducted the sum of $870, for work done on the section by *Toy* to that amount.

And proved, by *Robert S. Hollins*, that he was the secretary of the plaintiffs; that the plaintiffs had agreed with the said *Yk. and Md. Line R. R. Co.* to make on its behalf the payments to become due by it on said contract; that he, as agent for the plaintiffs, received from *Mr. Trimble*, the engineer for the time being, the final estimate of the work done by the defendants under their contract, after which, he was called upon, at the office of the plaintiffs, by the defendant, *Passmore*, in regard to the settlement of the claims of the defendants under their contract; that he shewed him the final estimate, which *Passmore* examined and returned to the witness, under the remark, that the deduction for work done by *Toy* was too great; that the next morning, the defendant, *Faunce*, called at the office of the plaintiffs and examined the final estimate, and handed it back to the witness, with a request, that he would state what amount was due to the defendants: and that thereupon, the witness made out a statement of what was due the defendants, intending to state the same according to the said final estimate—which statement he now produces, and which showed a balance due the defendants, $3,306 10.

The paper also showed the payments to the defendants to be—

Small notes, ...	$1,006 00
3 months, ...	1,300 10
6 months, ...	1,000 00
	$3,306 10

And that in making said statement, he omitted, by mistake, to make a deduction of $870, for work done by *Toy*, which deduction was made by the final estimate; and that the balance, which he stated to the defendants to be due to them, was erroneous to that extent; that on the preceding morning, the defendants both came to the office of the plaintiffs, and that the final estimate and the statement above mentioned were put into their hands; that they were some time looking over

them, in the course of which the defendant, *Faunce*, asked the defendant, *Passmore*, whether the balance would be sufficient to pay their debts: and upon his replying in the affirmative, they then both declared their willingness to settle, after which, the witness paid them, on behalf of the plaintiffs, the said balance of $3,306, (which was, by his mistake, $870 too much, as already stated,) and obtained their receipts therefor and their release, under seal, to the *Yk. and Md. Line Rail-road Co.* for the work done.

The plaintiffs further proved, by the said witness, that he had no authority from the plaintiffs to make any settlement, except upon the basis of the said final estimate; that he would not have made the payment of $3,306 10, had he been aware of his mistake, in failing to deduct the $870, which is deducted by the final estimate; that on the same day on which said payment was made, and shortly after the defendants had left the office of the plaintiffs, he discovered, by a conversation with *Mr. Trimble*, that he had made the mistake above mentioned; and thereon proceeded with said *Trimble*, immediately, in search of the defendants; in the course of an hour, they found the defendant, *Faunce*, and stated to him the mistake that had been committed by this witness, and demanded the return of the money, to which his only reply was, that he was not acquainted with the work done, but would find *Passmore*, who was out paying his bills, and bring him to the office, and there examine into the matter, upon which the witness returned to the office; and after waiting there some time in vain for the defendants, proceeded again in search of them, in company with *Mr. Charles Howard*, the president of the plaintiffs, and met them—and the subject of the mistake again brought up, and *Mr. Howard* offered if the over-payment were returned, to cancel the final release and receipts, and take a receipt on account for the residue;—but that this was refused, and the defendants declined returning the money, and assigned no reason therefor, so far as the witness recollects.

The defendants thereupon, to sustain the issue on their part, proved by the cross-examination of the same witness,

that he had no personal knowledge of the extent of the work done by the defendants under their contract. And further offered to prove by him, that the payment which he made to the defendants, as already given in evidence by him, and as shown by the papers so offered in evidence by the plaintiffs, consisted of the following, viz:

In small notes, issued by the plaintiffs, of the denomination of one and two dollars, and of the form herewith exhibited—to the amount of $1,006; and in the promissory notes of the plaintiffs, of $100 each, some payable at three, some at six months, and of the form herewith exhibited; as is shown by said papers, so offered in evidence by the plaintiffs as aforesaid.

To the admissibility of which evidence, the plaintiffs objected. But the court (ARCHER, C. J., and LE GRAND, A. J.,) overruled said objection, and allowed said evidence to go to the jury. The plaintiffs excepted.

2D EXCEPTION. The plaintiffs, to support the issue on their part, gave in evidence the facts already stated in the first bill of exceptions. And the defendants, to support the issue on their part, also proved the facts which were given in evidence by them, as already stated in the same bill.

Thereupon, the plaintiffs proved that all the $100 notes by the plaintiffs had come in and been paid; and that all their $2 notes had likewise been redeemed; but that there still remained out about $230 of their $1 notes.

The defendants further proved that an agreement has been made with the *Citizens Bank* for the redemption of the $1 and $2 notes of the plaintiffs; and that they circulated as money in the community.

The plaintiffs then prayed the court to instruct the jury:—

1st. If the jury find, from the evidence, that at the time of the settlement between the defendants and the witness, *Hollins*, the said witness, exhibited to them the final estimate of the work done, and the sums to be paid for it, which has been offered in evidence; and that the said witness intending and agreeing to pay the defendants for the work done, according to the said

final estimates, and having no authority, as the agent of said company to pay them in another mode, or to make any additions or deductions from the sums as allowed or charged the defendants by said estimates; and intending to pay the defendants for said work according to the said estimates, &c. the allowances and deductions made thereby, did, by mistake, omit to make the deduction of $870 appearing on the said estimate for graduation, as a deduction properly chargeable to and to be made as against the defendants from the amount fixed by said estimate; and that said *Hollins* settled with them, and paid them by mistake, the whole amount of the sum allowed by said estimate for graduation, without deducting said $870, and took from said defendants their receipts and releases, which have been offered in evidence. And if the jury also find, that after said payment by mistake, the said witness, with the president of the plaintiffs, called upon the defendants and made known to them the said mistake, and demanded of them the return of the said amount, so over-paid by mistake, and the defendants, upon such demand, refused to return the said over-payment, and have never since returned it to the plaintiffs—then the plaintiffs are entitled to recover the same sum of $870, with such allowance for interest as the jury may deem it proper to make.

2d. If the jury find the facts stated in the plaintiffs' *first prayer*, then the plaintiffs are entitled to recover—notwithstanding the jury may find, from the evidence, that the payment was made in the $100 notes, and in the $1 and $2 notes of the plaintiffs, as proved by the witness, *Hollins*.

3d. If the jury find that the payment was made to the defendants by the witness, *Hollins*, as stated by him in his evidence; that there was no illegality in the said payment, except as to the $1 and $2 notes, so paid out by said witness; and that the payment of the $100 notes, as proved by him, was not illegal.

4th. If the jury find the facts stated in the plaintiffs' first

prayer, then the defendants are estopped from alleging that they had not money in their hands, to the extent of the over-payment, to respond to the plaintiffs in this action.

5th. If the jury find the facts stated in the plaintiffs' first prayer, and that no application was made, either by the plaintiffs or the defendants, of the payment made by the said *Hollins* to the defendants, then in the proper and legal application of the same, the $1 and $2 notes paid to them, as stated by said *Hollins* in his evidence, are first to be applied to the payment of the sum of debt, on account of which, they were so paid to the defendants by said *Hollins;* and the plaintiffs are entitled to recover for the said over-payment by mistake.

6th. If the jury find, from the facts stated in the plaintiffs' first prayer, and so find that the payment to the defendant by the witness, *Hollins*, was, in part, made in the $1 and $2 notes of the plaintiffs, as stated by the witness, *Hollins*, then said $1 and $2 notes, so paid to and received by the defendants, were in law applicable to the payment of the debt, on account of which, it was so paid to and received by the defendants, and was, under the facts stated in the plaintiffs' first prayer, money in their hands for the payment of said debt.

7th. That if the jury find the facts stated in the plaintiffs' first prayer, and that the payment so made to the defendants by the witness, *Hollins*, was made, as stated by said *Hollins*, in the $100 and $1 and $2 notes of the plaintiffs; and if the jury also find that the said defendants had in fact applied, before the said demand made by the president of the plaintiffs, the said $1 and $2 notes of the plaintiffs so received by them, in whole, or in part, to the payment of the said debt on account of which they were so received, then the plaintiffs are entitled to recover.

8th. That if the jury find the fact stated in the plaintiffs' first prayer, and that the payment so made to the defendants by the witness, *Hollins*, was made, as stated by said witness, in the $100 and $1 and $2 notes of the plaintiffs; and that the said defendants, after the receipt of the same, had paid away

in discharge of their debts, or recovered the money on the said $1 and $2 notes, or any part of them, before the bringing of the action, then the plaintiffs are entitled to recover to the extent of the said payment away, in discharge of their debts by said notes, or of the money received on them by the defendants before the bringing of this action.

9th. That if the jury find the facts stated in the plaintiffs' first prayer, and if they also find that the payment to the defendants by the witness, *Hollins*, was made in part in the $100 notes of the plaintiffs, as stated by said *Hollins* in his evidence, and that the defendants expressly agreed to receive said $100 notes in payment of the debts, on account of which, they were paid to and received by the defendants, then the said $100 notes so received and agreed to be taken in payment by the defendants, were in law a payment of said debt; and that they were money in the hands of the defendants, by the force of such receipt and agreements, to respond to the plaintiffs in this action; and that the receipts and release of the defendants, for or on said payment, which have been offered in evidence, are evidence that the defendants did expressly agree to receive the said $100 notes in payment of said debt.

10th. That if the jury find the facts stated in the plaintiffs' first prayer, and if they also find that the said payment, made to the defendants by the witness, *Hollins*, as stated by the witness, *Hollins*, in part in the $1 and $2 notes of the plaintiffs, and that the said defendants, having received and given receipts and release, as before stated, did in fact apply the same notes to the payment of the debt, on account of which, they were so received and applied, did in law amount to the payment of the said debt, to the extent to which they applied and covered said debt.

The court (Archer, C. J., and Le Grand, A. J.,) refused to grant said prayers and each of them—to which refusal, as to said prayers and each of them, the plaintiffs excepted.

The verdict and judgment of the court below being in favor of the defendants, the plaintiffs appealed to this court.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By CAMPBELL and MCMAHON for the appellants, and

By NELSON for the appellees.

CHAMBERS, J., delivered the opinion of this court.

Two questions arise on this record: First, whether the plaintiffs can recover back money, paid under such circumstances of knowledge or means of information as existed in this case? And secondly, if entitled in other respects, whether the plaintiff is precluded by reason of the character of the notes in which the payment was in part made?

The facts upon which the opinion of the court was asked, are, that the payment was made in the mistaken belief that the sum paid was the true balance appearing due by the final estimate, and that the agent who made the payment for the plaintiffs intending to pay that balance, and not noticing the deduction of $870, paid a sum larger by that amount than he intended.

It is rightly said, that a party cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to make such payment existed. If informed of the law which exempts him, he must abide the consequences of his folly, in abandoning the protection it afforded him—if ignorant, he was bound to acquire information.

It is regarded as a gift without consideration. But full knowledge of the facts is here negatived. The statement in the bill of exception assumes, and the testimony of the witness shows, that he made the payment, believing at the moment of making it, that the engineer, whose estimates he was bound to regard, had certified the sum to be due which was actually paid.

Then it is urged that ample means were at hand to obtain full and accurate information, and many cases have been referred to as establishing the proposition, that a recovery cannot

be had where the party paying has access to information, and by his own laches neglects to acquire it.

Certainly some of the authorities seem to countenance such a doctrine; but, we think, the opposite opinion best accords with the plainest principles of justice, and has the weight of authority to sustain it. The case of *Lucas and others*, and *Worwick*, 1 *Mod. & Rob.* 293, in many particulars, resembles this case.

The defendant had a claim against the plaintiffs for work and labor, amounting as defendant alleged, to £142; the plaintiffs disputed certain items, and admitted a balance of only £97; at defendant's request, *Lucas*, one of the plaintiffs, paid £20 on account. The defendant afterwards met *Lucas* and agreed to abandon the disputed items. Whereupon, *Lucas* paid him £97, forgetting the previous payment of £20; but, almost immediately after, notified the defendant of the mistake, and demanded the return of the £20; and on his refusal, the action was brought to recover that sum.

The case was fully discussed before *Denman* and *Baron Bolland*, who held that as the money was paid by mistake in the hurry of business, it might be recovered back as received to the use of the plaintiffs.

The case of *Kelly vs. Solari*, 9 *M. & W.* 54, was fully considered. There the parties paying had at one time a knowledge of the fact, the forgetfulness of which subsequently induced them to make the payment. The Chief *Baron*, at *nisi prius*, instructed the jury, that the previous knowledge or means of knowledge would prevent the recovery; but on argument, he united with all the other *Barons* in the opinion, that there must be knowledge existing in the mind at the time of the payment. Of what avail is it, in any view of justice or sound sense, that a man once knew or had means to know a fact, if, at the moment when alone, such knowledge is practically useful, he is actually ignorant of it?

A payment cannot well be said to be made voluntarily when it is made in consequence alone of a false view of facts. The assent is only induced by the conviction then prevailing in the

mind, that the particular fact existed, and is scarcely to be distinguished from an assent or agreement to pay on the condition that the fact did exist.

The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights. Of what avail is it, that industry and vigilance might have procured the information? Still the party has done an act he did not intend to do, and did not know or believe he was doing. In this case, the agent assented and agreed to pay only what the engineer certified; he supposed he was paying no more when he delivered the notes to defendants, and his volition was no more involved in any amount beyond, than it would have been had he paid them a bank note of $1,000, misreading, and intending it to be a note of $100.

In the case of *Bell vs. Gardner*, 4 *Man. & Gran.* 11, found in 43 *Eng. Com. Law*, 16, the Judges of the Common Pleas, unanimously adopt the principle of *Lucas & Worwick*, and applying it to the case before them held it to be a good defence to a suit on a promissory note, that it had been given to the plaintiff to discharge a debt supposed to be due; but which, owing to a fact then unknown to defendant, was not legally recoverable, although the defendant had ample means of knowing the fact.

We are therefore of opinion, that there was nothing in the facts of this case as stated in the exception, which would prevent the plaintiffs from recovering, because of the alleged voluntary character of the payment with the means of knowing and correcting the error under which it was made.

We will now consider whether the recovery is barred by reason that the payment was made in the particular notes which the defendants received.

It has been denied in the argument that these small notes were illegally issued. We are inclined to think they are prohibited; but do not find it necessary to express a more decided opinion upon that point—assuming the small notes to have been issued illegally, how will the case stand?

The plaintiffs' agent paid away $3,306 10, being more by $870 than was due, and more than he designed to pay; of the sum paid, $1,006 were in small notes illegally issued by the plaintiffs, the residue, $2,300 10 in good paper, the defendants received the whole as money, and as the evidence shows have used the notes as money in a few hours after the payment.

The agent having discovered his mistake, called on the defendants to return him the notes to the amount of $870, the sum overpaid by mistake, and they refuse to return the notes or account in any manner for the sum overpaid, and now contend that principles of public policy forbid the plaintiffs from enforcing such demand.

We cannot yield our assent to a proposition which would sanction such a result. The law properly and consistently withholds its aid when parties ask to enforce an illegal contract—all are presumed to know the law, and if a contract be made to violate it, whether it be a contract to perpetrate a crime, *malum in se*, such as murder or arson, or to violate a municipal enactment, such as the act prohibiting the issue of small notes, and a remedy is sought either to enforce such contract or to obtain compensation for a breach of it, the parties are properly told the law will neither assist you to coerce another to violate its provisions, nor suffer you to recover against another for refusing to do so.

In this case the plaintiffs do not ask to enforce any illegal contract. They do not ask to recover against defendants for refusing to violate the law. The defendants have received of them, as and for money, a large amount of notes—part good, and part not good, in consequence of a mistake committed by their agent. Their demand was to correct this mistake—to return the notes, or any of them, which were paid by mistake. Clearly, there is no violation of any law in such a claim. If the same amount of notes, and of the same denomination, had been found in the street by the defendants, or by any other person, would it be an answer to a claim made for them by plaintiffs, that a part of the property thus found consisted of small notes, issued contrary to an Act of Assembly? Or, to

put a case more nearly resembling the one before us, if not identical in principle, would it be a sufficient answer, under such circumstances, to say the notes found amounted to $3,306? You are justly indebted to me in the sum of $2,436, which leaves but $870; and amongst the notes, there were more than to that amount in small notes, illegally issued. Now, the defendants had no more claim to these notes, or any of them, than if they had found them: and, we think, there is a manifest distinction between such a case as this, and one to which the principles apply, which are referred to by the defendants' counsel.

The case of *Baugher vs. Danner's Executors*, affirmed in this court at December session, 1844, MS. is not like this case. There, *Joseph Danner*, a citizen of the town of *Emmittsburg*, was permitted by the corporation of the town to issue small notes in the name of the corporation, but for his sole benefit, and for the payment of which, he was to be alone responsible. He did issue a large amount of such notes, which were received as currency; and amongst others, the complainant, *Baugher*, received them to a considerable amount. *Danner* afterwards, by his will, directed his estate, real and personal, to be sold by his executors, and the proceeds to be applied to the payment of his debts and the small notes, issued by him in the name of the corporation of *Emmittsburg*, for which issues he was individually bound. The executors sold the estate, and refused to apply any part of the proceeds to the payment of these small notes, which he held to the amount of more than $1,200. The bill was filed to coerce payment, but was dismissed, upon the ground that it was an attempt to enforce the execution of an illegal contract. The notes were issued in violation of law; the promise to pay, which they contained on their face, was void by the Act of Assembly; and the very object of that proceeding was to obtain the aid of a court of equity, specifically to enforce the execution of a contract, held by the court to be void. Such is not the case here; there was nothing illegal in the demand of the plaintiffs—nor would a compliance with it involve any violation of law.

The case of *Catts* and *Phalen*, 2 *Howard*, 380, is in principle similar to this. *Catts* was in that case employed by *Phalen* to draw lottery tickets from the wheel. *Catts*, having secretly procured a ticket, concealed in his coat sleeve the numbers corresponding with those on his own ticket: and instead of fairly drawing such numbers as presented themselves by chance, drew out the concealed numbers, and thereby caused the ticket, held by his accomplice for his use, to be considered entitled to the highest prize; and *Catts* afterwards, through his accomplice, received the amount of the prize, for which sum the action was brought.

The defence was that the lottery was prohibited by law, and the money being received in the course of an illegal transaction, could not be recovered back. But the Supreme Court held the defence was not tenable, and affirmed the judgment of the Circuit Court, which had decided the recovery could be had.

The next difficulty suggested in the way of a recovery is, that this being an action for money had and received, it must be proved that *money* was actually received by the defendants.

The authorities cited, however, make it clear that any thing received *as money* will entitle the party. Thus, a bond, a note, a credit in account, and even land when received and acknowledged as money, have been respectively held to be sufficient to sustain a count for money had and received. Here, there are circumstances to show the defendants received money for the small notes; and they received, also, a large part of the payment in good notes.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN GUY *vs.* SAMPSON TAMS.—*December*, 1847.

Where the court is called upon to instruct the jury as to the law arising on the facts, this impliedly assumes the correctness of the pleadings.

Where a claim would be barred by the statute of limitations, but for its revival by a subsequent promise to pay, it is not necessary to declare upon the new promise. Its effect is to revive the old, original, cause of action, by removing the statutory bar. It is not material whether the new promise be absolute or conditional. It is a matter of evidence, not of pleading. If conditional, it must appear to have been performed.

Where a debtor promises that, if allowed a little time, he would pay all his debts, and the creditor forbore to sue for two years, that is sufficient performance.

Whether a new promise, made by a debtor within the time of limitations, applies to the original debt, is a fact for the jury.

Before the court can grant a prayer of the defendant—that the evidence offered by the plaintiff does not remove the bar of the statute of limitations—it must assume the truth of every fact, in support of the plaintiff's claim, which the jury, under the testimony, are competent to find.

To remove the bar of the act of limitations, it is not necessary that the creditor, at the time of a new promise, should exhibit the evidence of his claim, or state the precise nature or amount thereof. These are facts for the jury, who must find to what debt or claim the new promise related. If the plaintiff shows but a single indebtedness, it may apply to that; and then, if the debtor alleges a different debt, the *onus* of proving it rests on him.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, commenced on the 6th December, 1843, by the appellee against the appellant. The defendant pleaded *non assumpsit* and limitations.

After verdict for the plaintiff, there was a motion for a new trial, which the County Court overruled.

The plaintiff offered in evidence the following notes, to wit:

"*Phila.*, *July 5th*, 1839.

"$112 40.—Sixty days after date, I promise to pay *Sampson Tams*, or order, $112 40, value received, without default; payable at the counting-house of *Mr. M. Newkirk*, *Market Street*. JOHN GUY."

"*Phila.*, *July 5th*, 1839.

"$112 40.—Ninety days after date, I promise to pay *Sampson Tams*, or order, without defalcation, for value received,

$112 40; payable at the counting-house of *Mr. Matthew Newkirk, Market Street.* JOHN GUY."

The plaintiff then called *Kerr* as a witness, who proved, that on 25th Nov. 1841, *Mr. Sampson Tams*, plaintiff, called with witness at *Guy's house;* and in the course of conversation with *Guy*, *Tams* said, you (*G.*) are aware that I never troubled you for the payment of what you owed me. *Guy* then said, I am aware of it, and if I am allowed a little time, I will pay your debt; and that he would certainly do his best for him, *Tams.*

On cross-examination, witness said he had not been invited to go to *Guy's house* to hear any conversation between *T.* and *G.;* that he made a memorandum of the conversation the next day in one of his books; and on producing it, the memorandum was as follows:

Memorandum. On 25th Nov. 1841, *Mr. Sampson Tams*, *W. J. Kerr* and myself, called in the evening about ten o'clock at the public house, kept and known as *Guy's Monument House;* in course of conversation between *Mr. Guy* and *Mr. Tams*, he, *Mr. T.* said, that he never troubled him for the payment of what he (*Guy*) owed him. Whereupon, *Mr. Guy* said he was aware of that, and if he was allowed a little time, he would pay his debt; and that he would most certainly do his best for *Mr. Tams.*

E. M. Kerr, witness, then said, that he had first made the memorandum to read "all his debts," but immediately corrected it by erasing the word "all," and the letter "s" after debt—thus applying *Guy's* promise only to *Tams'* debt, because he so understood *Mr. Guy* to say. Witness also stated that he was, for many years, a partner of *Mr. Tams*, but not until after the debt of *Guy's* was contracted, and is not interested therein. Whereupon, defendant prayed the court as follows:

1st. That if the jury shall believe that, at the interview between *Tams* and *Guy*, *Tams* said to *Guy*, I never troubled you for the payment of what you owed me—and *Guy* said he was aware of it, and if he was allowed a little time, he would pay all his debts; and that he, *Guy*, would most certainly do his

best for *Mr. Tams;* that such is not a new assumption to take the case out of the statute of limitations.

2d. That if the jury believe that *Tams* went with witness, *Kerr*, to *Guy's* house, and that while there, *Tams* entered into conversation with *Guy* and said to him, I never troubled you for the payment of the debt you owed me; but did not produce or shew any evidence or evidences of debt to said *Guy*, nor say nor intimate that he then held two notes of said *Guy*, or indicate to *Guy*, in any manner, the amount of his claims then, although the jury believe that in that conversation *Guy* did say, if you will allow me a little time, I will pay your debt, and he would certainly do his best for him—does not remove the bar of the statute of limitations. Both of which prayers, the court (ARCHER, C. J., PURVIANCE AND LE GRAND, A. J.,) refused to grant. Defendant excepted.

The defendant prosecuted this appeal.

The cause was argued at December term, 1846, before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By MEREDITH for the appellant, and

By MCMAHON for the appellee.

DORSEY, J., delivered the opinion of this court.

The defendant's first prayer is as follows:

"That if the jury shall believe, that at the interview between *Tams* and *Guy*, *Tams* said to *Guy*, I never troubled you for the payment of what you owed me; and *Guy* said he was aware of it, and if he was allowed a little time, he would pay all his debts, and that he, *Guy*, would certainly do his best for *Mr. Tams;* that such is not a new assumption to take the case out of the statute of limitations."

This prayer raises no question as to the conformity of the proof to the pleadings in the case; it impliedly assumes the correctness of the pleadings; and simply calls on the court to instruct the jury, as to the law arising on the facts which it contains. But were it otherwise, and the court below

were assumed to have made its refusal as well upon the pleadings as the proof recited in the prayer, the propriety of the decision would not be affected by the assumption. In this State, where a claim would be barred by the statute of limitations, but for its revival by a subsequent promise to pay, it is not necessary to declare upon the new promise. Its effect is not to give a new and substantive cause of action, which must be declared on as such, but to revive the old, original, cause of action, by removing the statutory bar. The original cause of action may be declared on, as it has been in this case, in the same manner as if it had never been obnoxious to the plea of limitations. If such be the law where the new promise is made, after the statutory bar has become complete, *a fortiori* should, such, the law, be applied to a case like the present, where before the bar attached to it, the new promise was made—and in this respect, it is immaterial whether the new promise be absolute, or conditional. It is wholly a matter of evidence, not of pleading; and the original cause of action is as effectually revived, the bar of the statute as fully removed, by a conditional promise, the condition of which has been performed, as it would be by an absolute promise.

What is the nature of the new promise stated in the prayer to have been made in the case before us? That, if he were allowed a little time he would pay all his debts. The condition for the allowance of a little time has been fully performed by the forbearance of the plaintiff below for nearly two years in the prosecution of his claim. To the interpretation given by the appellant's counsel to the concluding words of the promise, and that he, *Guy*, would certainly do his best for *Mr. Tams*, we cannot accede. Those words were not used to revoke or change the previous promise to pay if a little time were allowed him; but to strengthen and inspire confidence in the promise made, and to induce its acceptance. Had it been the intent of the appellant to promise to pay when he should be able, he would have used apt words for that purpose, and not made, as he did, a positive promise of payment, if but a little time were allowed him. In refusing the instruction re-

quired by this prayer, the County Court does not say that the promise made, if found by the jury, is sufficient to take the case out of the statute of limitations. In doing so, it would have trenched upon the province of the jury, in finding or assuming the fact, that the promise was made in reference to the debt due the appellee, of which debt, proof had been adduced before them. By granting the prayer, the court would in effect have instructed the jury, that under the proof in the cause, it was not competent for them to find that fact; and in doing so, it is conceived there would have been manifest error. We therefore approve of the court's refusal of the defendant's first prayer.

By the second prayer, the defendant called on the court to instruct the jury, "that if the jury believe that *Tams* went with witness, *Kerr*, to *Guy's* house, and that while there, *Tams* entered into conversation with *Guy*, and said to him, I never troubled you for the payment of the debt you owed me, but did not produce or show any evidence or evidences of debt to said *Guy*, nor say, nor intimate, that he then held two notes of said *Guy*, or indicate to *Guy* in any manner the amount of his claim, then, although the jury believe, that in that conversation *Guy* did say, if you will allow me a little time I will pay your debt, and he would certainly do his best for him, does not remove the bar of the statute of limitations." Before the court could have granted this prayer, it must assume the truth of every fact in support of the plaintiff's claim, which the jury under the testimony before them, were competent to find. It must, therefore, assume, as facts found by the jury, that apart from the statutory bar, the defendant was indebted to the plaintiff in the amount of the two promissory notes, of which he had given evidence; that such indebtedness was the identical debt to which the plaintiff and defendant referred in their conversation detailed in the prayer; and that since the promise, nearly two years elapsed before the plaintiff had instituted the present action for the recovery of his claim. These were facts *dehors* the prayer, and for the finding of which, by the jury, there was evidence before them legally suffi-

cient for that purpose. To remove the bar of the statute by a subsequent promise to pay, it is not necessary that the creditor at the time of such promise, should exhibit the evidence of his claim, or state the precise nature or amount thereof. These are facts to be found by the jury, who try the issues joined between the parties in the suit instituted, for the recovery of the debt. The jury must also find to what debt or claim the subsequent promise related. Should the evidence on the part of the plaintiff show but a single indebtedness, the subsequent promise might well apply to it. If the debtor alleges that there was a different debt to which his promise might apply, the *onus* of proving it rests on him. See 2 *Greenleaf's Ev.* 356, *sec.* 441. To have warranted the court in giving the instruction demanded by the second prayer, the proof in the cause must have been legally insufficient to have authorized the jury in finding the two following facts, viz: That the promise related to the debt, of which testimony had been given; or that after the promise, a little time was not given by the plaintiff before the institution of his suit. Believing the testimony before the jury amply sufficient to warrant them in finding both those facts, the County Court committed no error in refusing the defendant's second prayer.

JUDGMENT AFFIRMED.

THE FRANKLIN FIRE INSURANCE COMPANY *vs.* ALEXANDER HAMILL.—*December*, 1847.

In an action of covenant, the defendant pleaded *non infregit*, &c. with liberty to give in evidence any matter he might have pleaded; *provided*, he gave notice to the plaintiff of the matter of such evidence within, &c.—not having given the notice, the cause stood under the plea filed.

In such action under that plea, a parol agreement by which the time of performance of the covenant was enlarged, is not admissible in evidence.

A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing

to show the loss less than that claimed, would be admissible. The doctrine relative to mitigation of damages has no application to such a case.

In an action of covenant, where the plaintiff was not entitled to recover, unless he proved that the property insured was destroyed by fire; that notice of the loss, and an estimate of damage sustained, were furnished the underwriter, according to the terms of the policy, it is error in the County Court to instruct the jury, that the plaintiff is entitled to recover, in such a form as to take from them the consideration of the fact—when the fire occurred, and assume the day, or that notice of the disaster was forthwith communicated, and a particular account of loss furnished to the company.

APPEAL from *Baltimore* County Court.

This was an action of covenant, commenced on the 30th August, 1842, by the appellee against the appellant, to recover a loss by fire, under a policy of insurance of the appellants.

The defendants below pleaded that they had not broken their covenant; and the parties agreed that "all errors in pleading are released, and any matter may be given in evidence under the above plea, which might be given in evidence under any other plea, or pleaded; *provided*, notice in writing, of the substance of such defence, be given four weeks before the trial."

At the trial, the plaintiff offered in evidence the policy of insurance in this case, which it was admitted was executed by the defendants; the destruction by fire of the building, in which the property insured by the policy in this case, viz: a steam engine, and the machinery of a plaster mill, was situated; that it was damaged by fire, which occurred on the 20th June, 1842; an estimate of the loss by fire, made out by one *Cassidy*, was left with the defendants on the 15th July, 1842, and amounted to $4,140 47. The policy required that all persons insured, sustaining any loss or damage by fire, are forthwith to give notice to the secretary, and as soon as possible after, to deliver in as particular an account of their loss or damage as the nature of the case will admit of; and to produce to the Company satisfactory proof thereof. And proved, by said *Cassidy*, that said estimate contained, in his judgment and opinion, the fair and just value of the loss sustained by the plaintiff from said fire. And further proved, by said *Cassidy* and other witnesses, that in the judgment of *Cassidy* and of said

witnesses, the engine and machinery of the plaintiff, damaged by said fire, was, before such fire, worth from $3,500 to $4,000.

The defendants offered to give evidence by *Francis H. Smith*, the agent of the defendants, by parol, that within two days after the fire occurred in this case, the plaintiff called at the office of the defendants, and notified said witness of the fire; that said witness informed the plaintiff that he must make out his estimate of loss; that within two or three days after said fire occurred, the said *Smith*, as agent of the defendants, examined the damage done to the property of the said plaintiff, insured by the policy in this case, and finding the damage trifling, in comparison with the sum insured by said policy, elected, in behalf of defendants, to repair said insured property, under the provisions in the policy, and notified said plaintiff of such election, and informed the plaintiff, within three days from the occurrence of said fire, that the defendants were then ready to repair said insured property within the time provided in the policy; but that if said property should be repaired before the building in which the same was to be repaired and put up, was roofed in and repaired, that said insured property, so repaired, would be liable to injury from exposure to weather, &c.; and that at said interview between said plaintiff and the agent of the defendants, as also at several other interviews, it was distinctly agreed and understood between them, that for the benefit of said plaintiff, and to preserve his property from such damage by weather, &c., that the time within which said insured property was to be repaired and restored, according to the provisions contained in the policy in this case, should be enlarged and extended, and the repairs and restoration of said insured property dispensed with, and postponed until the building, in which the same was located, should be repaired and made fit to receive said insured property; that in pursuance of said last mentioned agreement, said witness went on to repair said building with all possible despatch; that within three days after said fire, said witness employed *Wells, Miller & Clarke*, machinists, to repair said insured property, who took said property in charge; and that as soon as said building was roofed in and repaired, said

insured property was repaired, and put in as good order and condition as it was before the said fire: and tendered the plaintiff by the following letter:

Agency Franklin Fire Insurance Co.
Baltimore, 7th October, 1842.

ALEXANDER HAMILL, Esq.

Dear Sir,—I have to inform you that the engine and plaster mill insured for you in this office, which was lately damaged by fire, is now in complete repair and ready for you. Should any part of the work not meet your approbation, you will please point it out, and if the complaint be well founded, it shall be attended to. F. H. SMITH, *Agent.*

(Endorsed,) "*Alexander Hamill, Esq.*, present."

But that he refused to receive the same, by his reply to said letter.

Sir,—I have your extraordinary note of 7th October, given me, after your Company had violated every engagement, and after a controversy pending, for the recovery of the amount of your insurance and suit instituted for redress, I hardly expected that you would have added insult to injury; but after the course you have pursued, what should I not expect from you?

Your ob't servant,

Oct. 8th, 1842. ALEXANDER HAMILL.

(Endorsed,) "*Francis H. Smith, Esq., Agent of Franklin Fire Insurance Company*, present."

That two or three days after the time limited for the repair of the insured property specified in the policy had elapsed—that is to say: on the 20th August, 1842, *Mr. Glenn*, as counsel for the plaintiff, called at the office of the defendants and demanded the payment of the amount insured by the policy, when he, the witness, informed said counsel of the agreement between said plaintiff and defendant, enlarging the time for the performance of the said repairs, &c. The witness also stated, that the defendants had a policy on the said house at the time of the fire, and elected to repair the same. The defendants

further offered in evidence by *Wm. C. Neale*, that he was at the time of said fire, clerk for the defendants; and that he, the witness, was present at frequent conversations at different times, between the plaintiff and *Mr. Smith*, the agent of the defendants, one of which occurred the day after the fire—in which it was agreed and understood between said plaintiff and said agent, that the time limited in the policy in this case, for the repairs and restoration of the property insured by the policy of insurance in this case, should be enlarged and extended; and that said repairs and restoration of said insured property should be postponed, until after the roofing in and repairing the building in which said insured property was located; that the defendants were ready at any time after said fire occurred to repair said insured property, and offered the plaintiff to repair said property in the presence of the witness, which offer said plaintiff declined, and preferred that said property should not be repaired and restored until after the building, in which the same was located, should be roofed in and repaired; and that in consequence of said arrangement, said insured property was not repaired within the time limited in the policy.

The defendants further offered in evidence by *Wells* and *Thomas J. Matthews*, practical machinists, that they were employed by the defendants to repair the steam engine and machinery, which was the subject matter of insurance in this case; that said insured property was put into the hands of said witnesses for repairs, within two or three days after the fire occurred, and they commenced said repairs forthwith, and prosecuted the same, from time to time, as their convenience permitted; that they did not hurry the execution of the said repairs, because they were informed by the agent of the defendants, that there was no need of hurry, and that said repairs were fully finished and completed, and put in as good order and condition as the said insured property was before said fire occurred, (if not in better condition,) by the 3d October, 1842; and that the whole cost of said repairs was $350, which was paid by defendants; that said plaintiff was notified, by letter from the said agent of said defendants, dated 7th October,

1842, that said insured property was ready for said plaintiff. The said witness of defendants also stated upon cross-examination, that he had no recollection that after the said estimate of loss was left with the defendants on the 18th July, 1842, as aforesaid, any other conversation was had between plaintiff and said *Smith*, in relation to any agreement to waive the time for repairing said insured property, as such time is limited by the policy, and by said witness, as well as by said *Smith*; that after *Mr. Glenn*, as the attorney of the plaintiff, demanded payment of said loss, on the 20th August, no understanding or agreement was had between plaintiff and defendants, in regard to any such waiver, but neither of said witnesses ever heard from plaintiff within thirty days after notice of loss as aforesaid, that he would not waive said time for such repairs. And the plaintiff gave in evidence that he consulted said *Glenn*, as counsel, in relation to said claim, and that under the advice of said *Glenn*, said estimate of loss was made out and left with the defendants' said agent, so as to authorize plaintiff to recover the amount of said loss, after the end of thirty days from the leaving of said estimate with the defendants.

The defendants also gave in evidence, that notwithstanding the leaving of such estimate of loss, and the demand of payment by said *Glenn*, as attorney of plaintiff, on the 18th July and 20th August, 1842, respectively, the defendants, nor said *Smith*, did not proceed to repair said loss within thirty days from either period, although the same could have been repaired at any time within ten days; nor did he, they or said agent, then direct said *Wells, Miller & Clarke*, to make such repairs with practical expedition.

The plaintiff further gave in evidence, that said insured property was not fully repaired, but stood in need of some $30 or $40 of additional work, in order to place the same in working condition, and that the same was, after being repaired as aforesaid, sold at public auction under a distress for two quarters rent due by the plaintiff, one-half of which accrued after said fire, and brought the sum of $240.

The plaintiff prayed the court to instruct the jury as follows:

1st. "That the plaintiff is entitled to recover the amount of damage he actually sustained by the fire, which occurred on the 20th July, 1842, if the jury believe that his loss was not repaired by the defendants within the time stated in the policy, and has not since been paid, and that no parol evidence is admissible to shew that said *Hamill* consented, in opposition to the terms of said policy, to allow such repairs to be made at any time after the period specified in such policy.

2d. "That even if such parol evidence were admissible, that the delivery to said defendants of an estimate of loss, the demand of payment and institution of suit was a rescission of such arrangement, and unless defendants repaired or paid as aforesaid, within thirty days after such rescission, plaintiff is entitled to recover for the actual loss sustained by him by said fire."

The defendants prayed the court to instruct the jury as follows:

1st. "That the testimony of *F. H. Smith* and *W. C. Neale*, in relation to the agreement between the plaintiff and the agent of the defendants, for the extension and enlargement of the time specified in the policy of insurance in this case, for the completion of the repairs, &c. of the subject matter of insurance, in case of loss or damage, is admissible, for the purpose of proving that said time was, by such agreement, enlarged and extended.

2d. "That if the jury believe the testimony of *Smith* and *Neale*, mentioned in the first prayer, that the plaintiff is not entitled to recover in this case.

3d. "If the jury believe from the evidence, that after the loss by fire in this case, and before the expiration of the period specified in the policy, for the repairs or restoration of the subject matter of insurance, it was agreed between the plaintiff and the agent of the defendants, with a view to the interest and advantage of the plaintiff, that the time for said repairs and restoration of the subject matter of insurance should be enlarged and extended, until the building in which said subject matter of insurance was located, could be repaired and made fit for the reception of said subject matter of insurance; and that the

defendants, relying upon such agreement, without any notice to the contrary from plaintiff, failed to have the said repairs, &c. made within the period specified in said policy; that the plaintiff is not entitled to recover in this case.

4th. "That the testimony of *Smith* and *Neale*, in reference to the agreement mentioned in the first prayer, is admissible in mitigation of damages."

The court (LE GRAND, A. J.,) granted the plaintiff's *first* prayer, but refused the *second*, and refused *all* the defendants' prayers; to which granting of the plaintiff's *first* prayer, and refusing to grant the defendants' prayers, the defendants excepted.

The defendants below prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

BY TEACKLE and MCMAHON for the appellants, and

BY MEREDITH and REVERDY JOHNSON for the appellees.

MARTIN, J., delivered the opinion of this court.

In this case, an action of covenant was instituted by the appellee against the appellants, on a policy of insurance against loss by fire, executed by the *Insurance Company*, on the 14th May, 1842.

The defendant pleaded *non infregit conventionem*, to which was annexed the following agreement, signed by the counsel in the cause:

"All errors in pleading are released, and any matter may be given in evidence under the above plea, which might be given in evidence under any other plea or pleas—*provided*, notice in writing of the substance of such defence be given four weeks before the trial."

It does not appear from the record that notice in writing was given by the defendants, of the defence on which they intended to rely as required by the agreement, and the case stands on the plea of *non infregit conventionem*.

In this condition of the pleadings, it is clear that the parol agreement for the extension of the time, within which the property might be repaired by the *Insurance Company*, according to the stipulations of the policy, was inadmissible, as there was no plea to which it could be applied.

The court, therefore, committed no error in rejecting the defendants' *first*, *second* and *third* prayers.

The court below were also correct in rejecting the defendants' fourth prayer.

In a contract of indemnity, like the one under consideration, the right to recover must be commensurate with the loss actually sustained by the plaintiff, and any evidence conducing to show that the damage consequent upon the fire was less than that claimed by the plaintiff, would be admissible; but the doctrine relative to the mitigation of damages, has no application to a case of this description.

The plaintiff, in his first prayer, asked the court to instruct the jury:

"That he is entitled to recover the amount of damage he actually sustained by the fire, which occurred on the 20th July, 1842, if the jury believe that his loss was not repaired by the defendants within the time stated in the policy, and has not since been paid; and that no parol evidence is admissible to show that said *Hamill* consented, in opposition to the terms of the said policy, to allow such repairs to be made at any time after the period specified in said policy."

By the *eighth* article of the policy, it is stipulated:

"That all persons assured by the Company, sustaining any loss or damage by fire, are forthwith to give notice to the secretary, and as soon as possible after, deliver in as particular an account of their loss or damage, as the nature of the case will admit of, and to produce to the Company satisfactory proof thereof."

It is evident that the plaintiff in this case was not entitled to recover, unless he proved that the property insured was destroyed by fire; and, that notice of the loss was given, and an estimate of the damage sustained, furnished to the Company,

as required by the eighth article of the policy of insurance. And, although the court were correct in deciding that the parol agreement was inadmissible under the pleadings in the cause; yet, they erred, we think, in granting the prayer, because, by so doing, they assumed as facts, questions which should have been submitted to the consideration of the jury. The cases of *Crawford vs. Berry*, 6 *G. & J.* 71, and the *Charleston Insurance Company vs. Corner*, are conclusive on this point.

In the last case, the court says:

"The first and second instructions are, in effect, an assertion by the court, that the *Eliza Davidson* was captured and detained by the *Pearl*, and in the third instruction, that the *Corrientes* was blockaded on and after the ship's release at *Montevideo*. Doubtless, the jury would have found these facts according to the testimony, but the sufficiency of evidence to satisfy the jury, or the circumstance, that it is all on one side, does not authorize the court to instruct the jury, that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right to weigh the credibility of evidence. In thus incautiously expressing their opinion, the court erred."

It is apparent from an examination of this prayer, that the court, by instructing the jury that the plaintiff was entitled to recover, assumed the fact, that a fire occurred on the day mentioned in the prayer, and also, that notice of the disaster was forthwith communicated to the secretary of the Company, and a particular account of the loss or damage sustained by the plaintiff, delivered as soon as possible after the fire, in conformity with the stipulations of the contract. These were questions for the consideration of the jury, and the court erred in granting the prayer.

The judgment of the County Court, is, therefore, reversed. But, we desire to be understood, as expressing no opinion on the question, whether the parol agreement offered in evidence by the defendants, would have been admissible in a different condition of the pleadings.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JAMES V. WAGNER AND E. A. MARSHALL *vs.* MENDEZ I. COHEN.—*December*, 1847.

After decree for a sale of real property, a sale reported by the trustee, and exceptions filed to its ratification still pending, a party interested in the proceeds of sale applied to the Chancellor for an injunction, on the ground that the reported purchaser, without the sanction of the court or those interested, had assumed the power to rent the property—and that it was about to be used by his lessee. The object of the injunction was to restrain such use. *Held*, that as it was not alleged that the property was subject to waste in the hands of the purchaser, or his lessee, or that its preservation was endangered by the disposition which the reported purchaser had made of it—the injunction should not have been granted.

Upon an appeal under the act of 1835, ch. 390, from the granting of an injunction only, this court is confined to the case made by the bill or petition. It does not examine the answer.

The necessity of filing an answer is imposed upon the defendant, as one of the conditions on which his right to appeal depends. The object of the act, in such requisition, was to prevent delay.

A contract of sale, made between the court as the vendor of property, through the agency of a trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court.

If the purchaser has not assumed the responsibility of protecting the property, by taking possession of it, any loss that may be sustained by its injury or deterioration in the interval between the sale and final ratification, falls upon the vendor. Still it gives to the purchaser an inchoate and equitable title, which becomes complete by the ratification of the court.

A ratification retroacts, and the purchaser is regarded, by relation, as the owner from the period of sale. He is entitled to the intermediate rents and profits; cannot escape from the sale, because disadvantageous, and is bound to pay interest on the purchase money from its date.

Possession obtained by a purchaser from a trustee acting under a decree, though before ratification, is not unlawful.

Where a sale under a decree is vacated, the purchaser, having been let into possession by the trustee, and enjoyed the use, is responsible for rents and profits.

A party interested in the proceeds of property decreed to be sold, although his right in the property is merged in the decree, retains such an interest as will enable him to apply to the court, which rendered the decree, to protect and preserve the estate from injury and waste.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 28th May, 1839, for the sale of the *Holliday Street Theatre*, in the City of *Balti-*

more. A decree was passed for its sale, and the trustee reported, that on the 20th June, 1846, at the *Exchange*, in the City of *Baltimore*, and at one o'clock, P. M., he sold said property to *James V. Wagner*, the highest bidder therefor, at the sum of $13,000, according to notice, &c.

The Chancellor passed the usual order for a confirmation *nisi*, &c., the 22d August, 1846.

On the 22d July, 1846, the appellee filed his exceptions to the ratification of the sale made by the trustee, which the trustee answered, denying the grounds thereof.

On the 9th September, 1846, *Mendez I. Cohen* filed his petition, alleging that on the 22d July, he filed certain exceptions to the final ratification of the report of *J. H. B. Latrobe, Esq.*, trustee in this cause, and upon the filing of which petition, &c. on the 23d July, 1846, an order was passed that the said exceptions should stand for hearing on the 22d September, then next ensuing. He further states that a copy of said order and said exceptions was duly served, according to the exigency of the said order, as by the admission of service will appear; that the said exceptions are yet pending and undecided; and that your petitioner has given notice of his intention to take evidence in support of the same, commencing on Thursday morning next; that on the evening of Monday, the 7th *September*, instant, according to previous announcement by handbills, and by advertisement in the *Baltimore* newspapers, the Theatre, in the said proceedings mentioned, was opened and a theatrical performance was had, under the authority and management of a certain *E. A. Marshall*, as professed lessee thereof; and your petitioner herewith exhibits, as a part of this petition, a copy of the advertisement of said performances; that upon diligent enquiry, he is satisfied that said *Marshall* claims to be lessee, in virtue of a contract and agreement, made by or on behalf of *James V. Wagner*, who is reported as the purchaser of said Theatre in the aforesaid report of said trustee—and to the ratification of which said sale, objection was made by the aforesaid exceptions, filed by your now petitioner. He therefore alleges

and charges, that said *Wagner* (or some agent of his assuming to act on his behalf, and whose act he has adopted,) has taken upon himself, pending the said exceptions, and without any application to the Court of Chancery for its sanction thereof, to rent said property, as if the said reported sale were ratified and confirmed, or as if he were the owner and actual proprietor of said property, thereby wholly disregarding the said exceptions, which were set down for hearing on the 22d September.

Your petitioner further states, that he is the owner of thirty-six shares of the stock, and as such, largely interested in the proceeds of the sale of said property; that said contract with said *Marshall*, was made without any conference, as far as he knows, with any of the stockholders—and certainly without conference with any number of the stockholders, and with no one, as he verily believes, in the capacity of a stockholder; and he is advised and respectfully insists, that pending said exceptions, and until it shall be decided whether or not the said reported sale shall stand, the said property is under the control of this court, and cannot lawfully be leased by any one, without its previous sanction. Your petitioner, on the foundation of his interest, objects to the leasing of said property, by or to any one, unless under the sanction of this court, and on such terms as may seem meet; and he exhibits this petition on behalf of himself, and of all other stockholders, and of other persons interested in the proceeds of the final sale, who shall come in and contribute to the expense of this suit.

Prayer for injunction to the said *James V. Wagner* and to said *E. A. Marshall*, commanding them, and each of them, to abstain from using said Theatre for theatrical performances or otherwise, by themselves or others, pending the questions which arise on the said exceptions, and to direct the manner in which notice shall be given to the said *James V. Wagner* and said *E. A. Marshall*, of the nature and object of this petition, &c.

The Chancellor (Bland) ordered an injunction, as prayed.

This petition was answered by the appellants, who thereupon appealed to this court, from the order granting the injunction.

The cause was argued at December term, 1846, before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By GLENN, JOHNSON and MCMAHON for the appellants, and By MCLEAN and WILLIAM SCHLEY for the appellees.

MARTIN, J., delivered the opinion of this court.

It appears from the record in this case, that a decree was passed by the Chancellor on the 29th of May, 1839, for the sale of the premises on which is erected the *Holliday Street Theatre*, in *Baltimore*, and a trustee appointed to make the sale. On the 22d of June, 1846, the trustee reported that he had sold the property on the 20th of June, 1846, to *J. V. Wagner*, the appellant; and on the day on which this report was returned, an order *nisi* for its ratification was passed, limiting the time within which cause against its confirmation was to be shown to the 22d of August, 1846. Exceptions to the ratification of this sale were exhibited by the appellee, on the 22d of July, 1846, and were ordered to stand for hearing on the 22d of September, 1846. The trustee put in his answer to these exceptions on the 31st of July, and on the 9th of September, 1846, an order was obtained, authorizing the parties to take testimony in relation to this disputed sale.

On the 9th of September, 1846, the appellee filed his petition, in which, after stating the pendency of the exceptions, he alleges, that theatrical performances had been advertised to take place in the Theatre, by *E. A. Marshall*, who claimed to be the lessee of the appellant, *Wagner*, and charges that the appellant had assumed, pending the exceptions, and without the sanction of the court, to rent the property to *Marshall*. The petition, then, after averring the appellee's interest in the property sold and its proceeds, as a stockholder, and that the lease to *Marshall* was made without the concurrence of any of

the stockholders, prays that an injunction may be granted, restraining *Wagner* and *Marshall* from using the Theatre for theatrical or other purposes, until the exceptions are decided.

On the 9th of September, 1846, an injunction was granted, in conformity with the prayer of the petition, and the answer of the appellants having been filed on the 12th of September, an appeal was taken from the order of the Chancellor to this court.

As the appeal in this case has been taken by the appellants, in conformity with the provisions of the Act of Assembly, of 1835, ch. 380, the first question presented for our consideration, is, whether, in revising the order of the Chancellor, we are confined to the case as made by the petition? or, are at liberty to examine the answer which was filed by the appellants, as preliminary to their right of appeal?

The third section of the Act of Assembly provides: "That where any injunction shall issue from the Court of Chancery, or any county court, as a court of equity, the defendant may appeal, the answer of such appellant being first filed, from the order of the Chancellor, granting the injunction or refusing to dissolve it, to the Court of Appeals of the Shore where such injunction shall have issued, and the said court, at the first term to which the case shall be transmitted, shall determine the said appeal, and shall pass such order in the premises as to it may seem right."

In the case of the *Union Bank vs. Poultney & Ellicott*, 8 *G. & J.* 324, an appeal was taken by the *Union Bank* from an order of the Chancellor, granting an injunction, under the third section of the act, to which we have adverted. The answer of the appellant having been filed, it was contended by his counsel, that it was the duty of the court to examine it. But the Court of Appeals placed their decision upon the allegations of the bill alone, without referring to the answer, and, although the question was not directly determined, the implication from the opinion of the court is, that they considered the bill as the only paper in the cause which they were authorized to examine. This is, we think, the correct view of the power of

the court, when acting upon a case brought before it, by an appeal under the provisions of the act of 1835, ch. 380. It must be apparent, that if this court, in reviewing the order passed by the Chancellor, and pronouncing upon its correctness, was influenced by a paper not exhibited below, it would become practically engaged in the exercise of original jurisdiction. The legislature intended to confer upon the court no such power, and the necessity of filing an answer was imposed upon the defendant, as one of the conditions on which his right of appeal depended, solely for the purpose of preventing unnecessary delay.

Putting aside then the answer of the appellants, as a paper to which the court cannot look in reviewing the order of the Chancellor, we turn to the petition, for the purpose of inquiring if a proper case was presented for the application of the writ of injunction.

It is certainly true that a contract of sale made between the court as the vendor of the property, through the agency of a trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court. And, therefore, if the purchaser has not assumed the responsibility of protecting the property, by taking possession of it, any loss that may be sustained by its injury or deterioration, in the interval between the sale and the final ratification, falls upon the vendor. In the case of *ex parte Minor*, 11 *Ves.* 559, it was determined: "That a purchase before the master, is not complete before confirmation of the report. Therefore, a loss by fire after the report, but, before confirmation, falls upon the vendor."

Although this is the character of the imperfect right acquired by a purchaser at a sale of this kind; yet, it gives to him, an inchoate and equitable title which becomes complete by the ratification of the court. When this is accomplished, the ratification retroacts, and he is regarded by relation as the owner from the period of the sale. He is as such proprietor entitled to the intermediate rents and profits of the estate; he cannot escape from the sale, because, he may believe it to be disad-

vantageous, and is bound to pay interest on the purchase money from its date; and has, therefore, a direct and strong interest in protecting the property from injury, and rendering it as productive as possible.

The petition is silent as to the mode in which this property was acquired by *Wagner*, the appellant; but the legitimate inference is, that he was placed there by the trustee; and, we think, a possession thus obtained with the consent of the trustee, as the agent of the court, cannot be characterized as unlawful. We can perceive no reason why possession should be withheld from a purchaser who had complied with the terms of sale, who has a large stake in the preservation of the property, and who is justly entitled to its use as an equivalent for the interest which he pays on the purchase money. It is to be remarked, that the appellee does not attempt to disturb the appellant in his possession of this property; but seeks only to restrain him from using it as a Theatre, or, for any other purpose. This is the act of which the petitioner complains, and which he endeavored to redress by the interposition of the court. He has placed his case upon the single ground, that *Wagner* has assumed the control and direction of the property, as if it was his own, pending the controversy in relation to these exceptions.

We have already said, that by a decree for the sale of this property, it vested in the Court of Chancery, and was held for the benefit of those interested in the sale, and in the distribution of the fund. It was the unquestioned duty of the court, as the proprietor of this property, on the application of any of the parties interested, to have adopted such measures as might be necessary for its preservation in the interval between the sale and the action of the court in reference to the question of final ratification; and to have devoted it during that period to some profitable purpose. This object, the court would have accomplished, by directing a temporary lease of the Theatre. And as this had already been done by the purchaser, who was interested in the preservation of the property, and in making it available, we can discover no reason for disturbing the lease;

and think, that the Chancellor in the exercise of a wise discretion, looking to the interests of those who were concerned in the proceeds of the property, should have refused the injunction. No injury could result to the creditors entitled to the fund, as upon the contingency of the sale being vacated, and the property re-sold, *Wagner* would have been clearly responsible in equity for its use and occupation.

The bill is instituted by the complainants for themselves, and such others as may come in and avail themselves of the proceedings, having claims of a like character, with those set forth in the bill against the property sought to be made liable; and although the right which the appellee, as a stockholder, held in this property was merged in the decree, he retained an interest in the proceeds of the sale, and was, of course, interested in the preservation of the estate, out of which the fund was to arise. We think, therefore, that the appellee occupied a position which entitled him to institute this proceeding; and if he had charged in his petition, that the property was subjected to waste in the hands of the appellants, as in *Casamajor vs. Strode*, 1 *Sim. St.* 381, or that its preservation was endangered by the disposition which *Wagner* had made of it, a case would have been presented authorizing the interposition of the Chancellor. No such allegation is, however, to be found in the petition, and the Chancellor erred, we think, in granting the injunction.

THE ORDER OF THE CHANCELLOR IS REVERSED, WITH COSTS, AND A DECREE WILL BE SIGNED DISMISSING THE PETITION.

Clement T., Eleanor B. M. and Ann T. Hilleary *vs.* Thomas J. Hurdle.—*December*, 1847.

A guardian executed a conveyance of negroes, by way of indemnity, to a security in his bond, which security bequeathed them to the wards, according to their respective shares and interests in a legacy made to them by their grandmother, and as a full equivalent for the money they were entitled to receive from her. Upon a bill to compel the guardian to account, and for a partition of the negroes, the complainants were held bound to prove the number of wards among whom the property was to be divided, or interested in the legacy.

The testator who held the negroes by way of indemnity had no title to them, unless he was damnified by reason of his suretyship.

But the wards might claim the benefit of this collateral security, and ask a sale of the negroes, in order to pay any sum of money which it was ascertained the testator, as a security on that bond, was answerable for.

Such collateral securities are trusts created for the better security of the debt, and it is the duty of courts to see that they fulfil their design.

Securities in a guardian's bond, other than the one indemnified, have an interest in such collateral securities until their liabilities are terminated, and should be consulted, and agree to any other application of the mortgage property than that contemplated by the mortgage. A partition of the negroes among the wards might deprive them of their interest in the indemnity.

If partition was made, the negroes might be recovered at law.

A complainant is not confined to the specific relief asked for in his bill—but he cannot obtain relief in opposition to its allegations.

A party cannot in his bill claim of his guardian, and at final hearing insist that the answers of other defendants entitle him to abandon the claim against the guardian, and prefer the same claim against co-legatees. To do this, he must amend his bill.

Appeal from the Court of Chancery.

The bill in this cause was filed on the 20th November, 1840, by the appellee, who claimed as husband of *Elizabeth Hilleary*, now deceased, leaving an infant child, *Elizabeth Hurdle;* and also under the will of *Eleanor Mulliken*, the grandmother of all the defendants, except *Clement T.*, and also of *Mary Hurdle.* The claim consisted of certain slaves, which came to the hands of *Clement T.* as the guardian of his daughter, *Elizabeth Hurdle*, and to investigate an alleged partition by *Clement T.* among his children. *Prayer* for discovery

account—delivery up of the slaves—for injunction, and general relief.

The will of *Eleanor Mulliken*, devised as follows:

"I give and bequeath unto my daughter, *Henrietta B. Mulliken*, her heirs and assigns, £100, current money; and after the above legacy is taken out of my estate, and my debts and funeral charges are paid, I give and bequeath to my daughter, *Mary Hilleary*, the wife of *Clement T. Hilleary*, one equal share of the residue of my estate, with my other children, *James Mulliken*, *William Beans Mulliken*, *John Beans Mulliken*, and my daughter, *Henrietta Beans Mulliken*, the said share or portion to be in current money, of *Maryland;* and under this express proviso, nevertheless: and it is hereby declared to be my intention, that my executor shall not be compelled to pay into the hands of the said *Clement Trueman Hilleary* any thing herein bequeathed unto my said daughter, *Mary Hilleary;* but that the same shall remain and continue in the hands of my executor, his executor, or such person or persons as he shall appoint, during the life-time of the said *Clement Trueman Hilleary;*—and in case the said *Clement Trueman Hilleary* should die before my said daughter, *Mary Hilleary*, then I give her an absolute estate in the said share or portion. But if my said daughter, *Mary Hilleary*, should die before her said husband, *Clement Trueman Hilleary*, then my will and desire is—and I hereby give and bequeath the said equal share or portion to her children, to be equally divided among them; and that during the life of the said *C. T. H.* the profits thereof shall be paid to my said daughter, *Mary Hilleary;* and that any receipts or writing, witnessing the payments of such profits to my said daughter, *Mary Hilleary*, and signed by her though covert, shall be sufficient discharges to my executor, or person or persons by him appointed as aforesaid."

The bill also alleged that in 1805, *C. T. H.* intermarried with *Mary Mulliken*, daughter of *E. M.*, lately deceased; that he had by *M. M.* the following children, viz: *Anne*, *Eleanor*, *William*, *Sarah*, *Mary* and *Henrietta Hilleary*, (which two last

named died in infancy, unmarried and intestate,) and *Elizabeth Hilleary*, wife of the complainant, who is since dead, left one child, *Elizabeth Hurdle*, now an infant; that *Mary H.*, the wife of *Clement T.*, died before the year 1821; that *C. T.* intermarried then with *Henrietta*, sister of his first wife; that *E. M.* devised to *Mary H.* an equal share of her estate, being the one-fifth part thereof, upon condition, hereinbefore set forth in the extract of her said will; that *C. T. H.* was appointed guardian to his said children, and as guardian, obtained possession of one-fifth of the estate of the said mother of his children, amounting to $1,600—all which, together with the profits thereof, he has continually applied to his own individual use and benefit; that *Tilghman Hilleary*, father of *C. T. H.* became one of his sureties on his guardian bonds for his children,—and for his indemnity as surety, obtained from the said *C. T. H.* a conveyance for certain negroes: and afterwards, by his will, directed his executor to transfer the said slaves and their issue, to the children of his son, *C. T. H.*, according to their several shares in said legacies, as a full equivalent for the money they were entitled to receive under the will of *Eleanor Mulliken*; and that shortly after the death of *T. H.*, the said slaves, with their increase, came to the possession of and have since remained in the possession of the said *C. T. H.* and his children. The other portions of the bill are not deemed material to be inserted.

The will of *Tilghman Hilleary*, and receipt of *C. T. H.* as guardian of his three daughters, *Eleanor*, *Ann* and *Elizabeth*, for a part of the distributive share of the personal estate of the late of *Mrs. Henrietta B. Hilleary*, dated 13th March, 1827, were also filed with the bill.

The answers of the defendants were also filed, and a great variety of proof taken; all which, as far as necessary, are referred to in the opinion of this court.

On the 19th Dec. 1842, the Chancellor (Bland) decreed a partition to be made of the negroes into three several parts—one to the complainant, in right of his wife; one to *Ann T. Hilleary*; and the third to *Eleanor B. Hilleary*, according to

their title under *Henrietta B. Hilleary;* and also referred the cause to the auditor to carry the decree into effect—and state the necessary accounts, with liberty to take further proof.

Further proof was taken; as also exceptions to the proof and pleadings. The auditor reported a partition, which was ratified on the 16th July, 1845.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By C. C. MAGRUDER and TUCK for the appellant, and

By T. S. ALEXANDER and PRATT for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The complainant in the bill before us, married the daughter of the defendant, *C. T. Hilleary*, who was duly appointed her guardian. The object of the bill is to compel the guardian to account for the estate of the complainant's wife, and for a partition of property, which, it is alleged, the latter (who was dead at the time of filing the bill,) held with her two sisters, and *Eleanor Hilleary*, who are also made defendants. The property claimed, consisted, in part, of a bequest by *Mrs. Mulliken* to her daughter, (who was the mother of *Mrs. Hurdle* and of the defendants, *Eleanor* and *Anne*,) and after her death to her children.

Tilghman Hilleary, the father of the defendant, *Clement*, became security in the bond executed by the latter, as the guardian of his children. A number of negroes were conveyed to this security by said guardian, to save him harmless as a security in that bond, and it appears that the security, *T. H.*, bequeathed those negroes, as to the children of *Clement*, according to their respective shares and interests in the legacy aforesaid, and as a full equivalent for the money, which they were entitled to receive from their said grandmother; of these negroes, the complainant claims in this suit *one-third*.

No proof or admission in the case entitles the complainant

to claim one-third of them. The bill itself does not allege that the mother of the complainant's wife left, at her death, but three children. It admits, that there were two others, *Mary* and *Henrietta*, "who have since departed this life in infancy, unmarried and intestate and without any issue." In the answer also it is stated, that there were five children. Of this latter allegation it is said, that there is no satisfactory proof in the record; but, before the complainant can be allowed one-third, there must be proof, or an admission, that there were but three children to claim the legacy.

The claim is to negroes, and by virtue of the bequest of the grandfather. Those negroes, the testator states, and it is admitted, he held only in virtue of the deed of indemnity before alluded to. He, of course, had no title to them, if he was not damnified by reason of his suretyship. They were not his property, to be disposed of as he pleased.

It is true that the wards might claim the benefit of this collateral security, might ask a sale of the negroes, in order to pay any sum of money which it was ascertained that the testator, as a security in that bond, was answerable for. *1st Equity Cases Abridged, (K.)* 5. *Phillips vs. Thompson, 2nd Johnson's Chan. Reports*, 418. *1st John's C. Reports*, 129. These collateral securities are trusts, created for the better security of the debt, and it is the duty of the Court to see that they fulfil their design. *1st John's Cas.* 205.

These negroes, conveyed by *Clement*, were probably answerable for more than the amount of *Mrs. Mulliken's* legacy.

Here there is a deficiency of proof. In regard to the portion of *Mrs. Henrietta B. Hilleary*, (the second wife of the defendant, *Clement*,) which is claimed by the complainant, the proof is not so satisfactory as it ought to be. Before a partition can be made, the number of children of the defendant, *Clement*, by his first wife, which of them, if any, are dead, and when they died, as well as at what periods other persons named in the bill died, who were entitled to the estate of *Henrietta B. Hilleary*, and the amount of her estate; these facts ought to be ascertained in order to a settlement by the

court of the accounts, and a partition of the property, sought in this bill.

The notion of the complainants seems to be, that the negroes mortgaged by *Clement* to *Tilghman H.* and by the latter bequeathed, as has been stated, are to be received in lieu of the legacy of *Mrs. Mulliken.* The legacy of *Mrs. Mulliken*, it would seem, the complainant is willing to give up, claiming only the negroes mentioned in the will of *Tilghman*, and, in addition thereto, the property derived from *Henrietta B. Mulliken.* But the legacy of the grandmother, and the interest of the complainant's wife and other children in the estate of their stepmother, constitute, so far as we are informed, the amount of their estate, and if the latter was received before the guardianship ceased, then the property, mortgaged by the defendant, *Clement*, to his security, may be made answerable for whatever was due from the guardian to those wards.

A partition is spoken of, and this is used as proof of the abandonment by *Clement* of his equity of redemption. But it seems that there was another security in the guardian's bond, who, it does not appear, has ever been consulted or allowed to give his consent to any arrangement in regard to this property, and until his liability on the guardian's bond is at an end, he has an interest in this collateral security, of which he cannot be deprived, but of which he would be deprived, by a distribution among these children of the negroes conveyed by the deed of indemnity. Besides, if the partition had taken place, the question would then arise, whether so much of the complainant's case was not rather a case at law, than in equity? The complainant proposes in the argument to abandon a part of his claim, as made by the bill, and to make another case to be found in the answer.

It is true, that the complainant is not confined by the specific relief asked in his bill of complaint, but he cannot obtain relief which is in opposition to his allegations. The objection here is not to the sufficiency of the averments of the bill. He cannot in his bill claim of the guardian, and at final hearing,

insist that the answers of the defendants entitle him to abandon the claim against the guardian, and to prefer that same claim against the co-legatees. These answers, perhaps, disclosed enough to justify the complainant in amending his bill of complaint, if he intended to seek the relief to which the matter set forth in those answers entitle him.

Various other points arise in the case, such as whether the depositions of some of the defendants were admissible for their co-defendants: whether a rehearing ought not to have been granted, and sundry depositions, upon which the motion for a rehearing was grounded, ought not to have been received as a part of the testimony? whether the complainant's wife conveyed to two of the defendants her property? If the deed was executed, was it not obtained by a fraud practised upon her? and if it was not so obtained, was not the deed *in fraudem maritagii?* Some of these are questions which belong to the case, and upon which, at this time, it is deemed inexpedient to express an opinion, as the proof upon which the decision of them depends, may hereafter present a very different case. The Chancellor's decree must be reversed with costs, for reasons already stated, and before any account can be directed, it must be ascertained by proof into how many parts the legacy of *Mrs. Mulliken* and the property of *Mrs. H. B. Hilleary*, are to be divided. As a commission must be obtained by the complainants to supply the defects in his testimony, an opportunity will then be afforded to the defendants of taking the testimony which they deem to be material in making out a portion of their defence.

DECREE REVERSED, WITH COSTS, AND CAUSE REMANDED.

PRISCILLA BUCHANAN *vs.* ARTHUR PUE, JUNR. *Executor of* EDWARD BUCHANAN.—*December*, 1847.

Although a testator may, as between the devisees of his real and personal estate, prescribe the mode in which his debts shall be discharged; and the dispositions made by his will, will be obligatory upon those who accept it; yet he has no power to withdraw from his creditors the personal estate—the primary fund for the satisfaction of their claims.

In a contest between an executor and a specific legatee, it appeared that the former, before the settlement of his accounts, had delivered to the latter the personal property, devised to her upon an agreement on her part to refund, if it should turn out that there was a deficiency of other assets to pay debts. The personal assets and some real estate, devised to be sold for payment of debts, proved insufficient, when the legatee was decreed to refund. As between such parties, the court refused to entertain the question—whether the testator intended to charge other portions of his real estate, which he had also devised to other parties, with the payment of his debts.

If it were the intention of the testator to exempt his personal estate from the payment of debts, the specific legatee of such estate might be subrogated to the rights of creditors, and claim to be reimbursed by the devisees of the realty. A bill for that object might still be filed by the legatee, when the interpretation of the will, as to that question, would be determined.

A legacy, delivered by an executor to a legatee, upon the entire confidence, sincerely entertained, that the assets of his testator would be sufficient for the payment of debts, but which proved to be inadequate, without default in the executor, may be recovered in equity.

A mere agreement to refund does not, in such a case, affect the rights of the parties.

Payment of a legacy, voluntarily made on a mistaken ground of fact, may be reclaimed.

Gratuitous services of great merit, rendered by a legatee to his testator, do not constitute the legatee a purchaser of his legacy.

A general legacy, given in consideration of a debt due the legatee, or relinquishment of any right or interest since the bequest, is not made as a bounty, but as purchase money, and will be entitled to a preference of payment over other general voluntary legacies.

APPEAL from the Court of Chancery.

The bill in this case was filed on the 24th February, 1845, by the appellee against the appellant, and alleged that *Edward Buchanan*, on the 16th June, 1843, made his will, containing the devisees hereinafter set forth, including certain leasehold property, to the appellant, and died in the month of *August*

following; that, supposing the testator's personal property and a farm in *Baltimore* County would be sufficient to pay his debts, he agreed with *P. B.* that she should take into her possession the chattels, real and personal, bequeathed to her, and hold the same, subject to any demand of the appellee, for the payment of the debts of his testator; that *P. B.* declared and agreed at the time thereof, that in case she sold the same, the proceeds thereof should be by her deposited in bank—there to remain untouched, until the estate of *E. B.* should be settled; that the said *P. B.* took possession of her legacies, disposed of the same, except the chattels real, and deposited the proceeds of sales in bank, where they now remain, the amount of such proceeds and place of deposite being unknown to the appellee; that she still holds the chattels real, as aforesaid; that after sale of testator's property, and payment away of assets, his estate is still in debt to the appellee and others; that it will require all the personal estate delivered to the appellant to pay debts still due, in order to save the real estate left by him from being sold; and that the said *P. B.* is bound, both according to the agreement entered into with the appellant, and by reason of a deficiency of other assets, to pay debts—to return the property received by her, which she refuses to do.

PRAYER for specific performance of her agreement, &c.

The will of *Edward Buchanan*, after ordering payment of his debts, and liberating a certain negro man slave, devised:

1. Certain real property in fee, to his nephew, *Arthur Pue, Jr.*, in trust to pay annuities and for life, with remainder to the children of said *A. P. Jr.*

2. A farm in *Baltimore* County, and all the residue of his real and leasehold estate and chattels, to his executor, with power to sell the same; *and the proceeds thereof, after payment of debts, &c.* he devised to the trustees of the *Male Free School of Baltimore*, and others, in proportions specified.

A codicil to this will declared:

"In consideration of the particular care and attention shown me by my sister, *Priscilla Buchanan*, during my protracted

sickness, I give and devise to her, her executors and administrators and assigns, all my household and kitchen furniture, and likewise my stock of horses, cattle, grain, provender, farming utensils and other chattels personal, belonging to me, that may be on my said farm in *Baltimore* County, at the time of my decease. I also give to my said sister, *Priscilla*, her heirs, executors, administrators and assigns, my house and lot of ground and premises, fronting on *Fleet Street*, *Fells Point*, in the said city of *Baltimore*."

All the property devised to *P. B.* was delivered to her by the appellee—and for which she executed a full and formal release, dated 29th August, 1843.

The answer of the appellant admitted, that she had sold a portion of the property devised to her, for $649 92; that she deposited the same in the *Savings Bank of Baltimore*, and is ready to account for the same, under the orders of this court; and that before the property, bequeathed to her by *E. B.*, was delivered to her, she did agree with the appellee to restore the same, or the proceeds thereof, if under the will of her deceased brother, and all the facts of the case, she was bound by law so to do. She denied any other agreement.

It was admitted that the unpaid debts amounted to a larger sum than the chattels, real and personal, devised to *P. B.*, and there was nothing to sell for payment of debts under the control of the executor, except the real property devised in trust as aforesaid.

The other material facts will be found in the opinion of this court.

On the 11th June, 1846, the Chancellor (Bland) decreed that *P. B.* pay to the complainant, &c. the sum of $649 92, and transfer and deliver the house and lot on *Fells Point* in the proceedings mentioned.

From this decree, the defendant in Chancery appealed to this court.

The cause was argued before Archer, C. J., Chambers, Spence, Magruder and Martin, J.

By J. M. BUCHANAN and C. F. MAYER for the appellant, and

By E. HAMMOND and G. W. DOBBIN for the appellee.

MARTIN, J., delivered the opinion of this court.

This is an appeal from a decree of the Chancellor, of the 1st June, 1846, by which it was ordered, that the specific legacy which had been delivered to the defendant by the complainant, should be returned to the complainant, to be applied by him as the executor of *Edward Buchanan*, in satisfaction of the testator's debts.

From this decree, the present appeal has been taken; and the counsel of the appellant in the argument in the cause have contended, that the decision of the Chancellor was erroneous, and ought to be reversed, mainly, upon two grounds:

First, because it plainly appears from the will of *Edward Buchanan*, executed on the 16th June, 1843, and the codicil to the will, which was executed on the 25th July, 1843, that the testator intended to charge his real estate with the payment of his debts, in exoneration of his personal estate, the whole of which he had specifically bequeathed to the appellant, by the codicil of the 25th July, 1843.

And *secondly*, that inasmuch as the legacy thus specifically bequeathed has been voluntarily delivered by the appellee to the appellant, and was accepted by her, the appellant is now precluded under the circumstances of this case from demanding a return of it.

In the case of *Walker vs. Jackson*, 2 *Atk.* 624, the Lord Chancellor said:

"That the personal estate is to be applied for the payment of debts in the first place, is the general rule, and it is as certain that a testator cannot, as against his creditors, exempt his personal estate.

"But against his heir at law, or the devisee of his real estate, he may substitute the real, in the room of the personal estate,

and charge his debts upon another fund not in its nature primarily liable."

This is the acknowledged doctrine on this subject, and it is to be received as an established principle, that although a testator may, as between the devisees of his real and personal estate, prescribe the mode in which his debts shall be discharged, and the dispositions made by the will, will be obligatory upon those who accept it; yet he has no power to withdraw from the creditors the personal estate, to which by the law they are authorized to resort, as the natural and primary fund for the satisfaction of their claims.

In the case of *The State of Maryland vs. The Bank of Maryland*, 6 *G. & J.* 230, the Court of Appeals said:

"An executor or administrator takes the funds of the deceased, to be distributed according to law, subject to such preferences as the law allows. The moment the debtor dies, the law asserts the rights of the creditors, and takes the property into its hands, and makes or directs a distribution of it, according to their priority. That being the law of the deceased persons' estates, which a testator cannot by his will defeat."

In the case now under consideration, a bill was filed by the complainant, as the executor of *Edward Buchanan*, for the purpose of reclaiming from the defendant, the legacy which he had delivered to her, that it might be appropriated as the personal assets of the testator to the payment of his debts; and it must be obvious, that in a controversy of this kind, the question agitated by the counsel for the appellant, with respect to the estate which the testator intended to be charged with the payment of his debts, does not arise, and cannot be properly adjudicated.

If the construction placed by the counsel for the appellant upon the will of *Edward Buchanan* is correct, and they can maintain the proposition, that it was the intention of the testator to exempt his personal estate from the payment of his debts, there is no doubt that the appellant, as the specific legatee of the personal estate, would be subrogated to the rights of the

creditors, and might claim to be reimbursed by the devisees of the real estate. But the devisees of the land are not before us, and we forbear, therefore, to intimate any opinion with respect to the true interpretation of this will. The position taken by the counsel for the appellant, on this branch of the case, certainly interposes no obstacle to the successful prosecution of the complainant's bill.

With respect to the *second* point made by the counsel for the appellant, we are of opinion there is no circumstance in this case which precludes the appellee from reclaiming this legacy in a court of equity.

It has not been pretended, that the insufficiency of the assets to satisfy the debts of the testator has been caused by the fraud or misconduct of the executor. The fund created by the sale of the farm in *Baltimore* County has been faithfully applied to the purposes designated by the will of *Edward Buchanan;* and after having been exhausted in the payment of his debts, there still remains outstanding debts amounting to the sum of nineteen hundred dollars, in addition to the sum of three hundred and forty-five dollars and thirty-eight cents, due to the executor for disbursements made, and debts paid by him, on account of the estate. And, we think, that as it is evident in this case that the legacy was delivered by the appellee to the appellant upon the entire confidence, sincerely entertained, that the assets would be sufficient for the payments of the debts of the testator, but have proved to be inadequate, without the fault of the appellee, he was entitled to coerce a return of it, through the instrumentality of a court of equity. Upon this subject, there appears to have been some contrariety of opinion in the early cases, but the principle we have announced will be found to be sustained by the weight of authority, both in *England* and in this country.

In the case of *Davis vs. Davis*, reported in 8 *Viner Abrgt.* 423, it was held:

"That an executor may institute a suit against a legatee, to refund a legacy voluntarily paid, as well as a creditor; and for this reason, an executor paying a debt of the testator out of

his own pocket, stands in the creditor's place, and has the same equity against the legatee to compel him to refund."

In *Hawkins vs. Day*, decided in 1753, *Ambler's Rep.* 160, *Lord Hardwicke* said:

"The rule in this court, to grant prohibitions in case legatees sue in the spiritual courts, and refuse to give security, is out of use; but the court will decree a legatee to refund."

In *Edwards vs. Freeman*, 2 *P. Wil.* 446, *Lord Chief Justice Raymond* declared:

"That if an executor pays a legacy on supposition that there are assets to pay all the other legacies, and there happens a deficiency, the court will make the legatee, who is paid his full legacy, refund."

The principle thus announced in the cases to which we have referred was recognized by *Lord Alvanley*, in the case of *Johnson vs. Johnson*, 3 *Boss. & Pul.* 169; by *Chief Justice Marshall*, in *Riddle vs. Mandeville*, 5 *Cranch*, 330; and has been directly adjudicated by the Supreme Court of *New Jersey*, in the case of *Harris vs. White*, 2 *Southard's Rep.* 425, and by the presiding judge of the Court of Appeals of *Virginia*, in *Galligo's Exec'rs vs. The Attorney General*, 3 *Leigh. Rep.* 489. And *Judge Story*, when treating of this subject in the 1*st vol.* of his *Equity Jurisprudence*, *sec.* 90, says:

"In the course of the administration of estates, executors and administrators may often pay debts and legacies upon the entire confidence, that the assets are sufficient for all purposes. It may turn out from unexpected circumstances, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground that they will be otherwise innocently subject to an unjust loss, from what the law itself deems an accident."

The same doctrine is maintained in *Walker vs. Hill*, 17 *Mas. Rep.* 385.

It is proper to state, that the view we have taken of this question is entirely unaffected by the agreement, said to have been entered into between the appellant and appellee, at the time this legacy was delivered. That agreement cannot be regarded as changing, in any respect, the rights of the parties. They stand precisely where they remained before the contract was made; because we understand the appellant only to have stipulated that she would refund the legacy, provided, she was under a legal or equitable obligation to do so. We place the right of the appellee to maintain this suit, upon the plain and acknowledged principle, "That the payment of the legacy was made on a mistaken ground, with respect to the facts of the case, and that therefore it would be unjust and inequitable in the legatee to withhold it." *Hutchins vs. Hope*, 12 *G. & John.* 256.

The codicil executed by *Edward Buchanan* on the 25th July, 1843, contains the following bequest:

"In consideration of the particular care and attention shown me by my sister, *Priscilla Buchanan*, during my protracted sickness, I give and devise to her, her executors and administrators and assigns, all my household and kitchen furniture, and likewise my stock of horses, cattle, grain, provender, farming utensils, and other chattels personal, belonging to me, that may be on my said farm in *Baltimore* County, at the time of my decease. I also give to my said sister *Priscilla*, her heirs, executors, administrators and assigns, my house and lot of ground and premises fronting on *Fleet Street*, *Fells Point*, in the said city of *Baltimore*."

The counsel for the appellant have relied on the expressions, "in consideration of the particular care and attention," &c. as indicating that the testator treated the appellant as his creditor; and that the property in controversy was bequeathed to her—not as a mere matter of testamentary bounty, but in payment of what he considered to be a debt, founded upon a valuable consideration, and justly due from him to the legatee.

But an insuperable answer to this argument is, that no claim has as at any time been preferred by the appellant against the

estate of the testator for these services; and her counsel have repudiated the supposition, that she was influenced by sordid motives in the care and attention which she bestowed upon her brother during his protracted illness.

The services rendered on this occasion by the appellant, were in the highest degree meritorious, but they were confessedly gratuitous; and it is impossible to place the appellant in the position of a creditor, or to impart to the legacy the character of a purchase, in a case where it is perfectly plain, and has indeed been conceded that there was no legal claim.

The rule upon this subject is thus laid down by *Roper*, in his *Treatise on Legacies*, 1 *vol.* 297:

"When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest since the bequest, is not made as a bounty like other general bequests, but as purchase money for the collateral right or interest, it will be entitled to a preference of payment, to other general legacies, which are merely voluntary." And the author says:

"It must be remarked, that, as it is the surrender of existing rights or claims which gives the preference to the legatee, it is necessary that those rights or claims should be subsisting at the testator's death."

It is not pretended that there was any debt or claim due and subsisting, or account of these services, from the testator to the appellant, at the time of his death; and it is clear upon all the cases, that she cannot be treated as a purchaser of this legacy. But as this is a contest between the executor and the legatee, and not between co-legatees, we desire to be understood as not meaning to intimate, that this fact, even if had been established, would have changed, in any respect, the aspect of this controversy.

DECREE AFFIRMED.

JAMES WILSON, CHRISTOPHER RABORG AND PETER EISENBURY, SURVIVORS OF THOMAS WILSON, *vs.* WILLIAM INLOES, JOSHUA INLOES, JAMES HOOPER, AND JOHN L. CHAPMAN AND WIFE, HEIRS-AT-LAW OF JONATHAN CHAPMAN.

December Term, 1847.

If a tract of land call to begin at a bounded tree by the side of a branch, and to run then course and distance to a *known* boundary, and the beginning tree be lost, to find the commencement of the first line of the tract, you must reverse the course and distance from the *known* boundary, and not elongate nor shorten the line to the branch. The expression as to the branch being merely descriptive of the general locality of the tree, and not an imperative call, locating the spot where the tree stood; and it is no objection to this rule, that by the reversal of the line, the beginning is shown to be in deep navigable water, at a great distance from the shore, or where the lost beginning could not have stood.

The leading object in the gratification of all calls is certainty in the location of grants of land.

It is a general rule, that if there be a peremptory call to an object of length by a course and distance line, and the object can be reached by gratifying the distance, but violating the course; or by conforming to the course, and disregarding the distance—the course must control the distance.

The word "by," when descriptively used in a grant, as in this case, does not mean "in immediate contact with," but "near" to the object to which it relates; and "near" is a relative term, meaning, when used in land patents, very unequal and different distances.

The reason assigned for running lines of lands to the boundaries called for at their terminations, instead of terminating them according to their courses and distances, is not exclusively, that greater certainty, as to the termini of such lines, is thereby attained; but also, because, thus locating grants, is more beneficial to grantees; and because, it is a rule of construction in expounding grants, to give them that interpretation, which operates most strongly against grantors, and in favor of the grantees.

A deed or patent for a tract of land passes nothing, unless the land described therein is susceptible of location; or, in other words, unless the survey thereof can be made to close, either as to the whole conveyed, or some definite part thereof.

If a tract of land be granted by *boundaries* only, without courses and distances, if the beginning or any subsequent boundary be lost, and its original situs cannot be proved, the entire tract is lost, and the grant thereby becomes inoperative.

If a tract be granted by courses and distances only, without calling for any boundary or object, save that, at the commencement of the first line, and it be

lost, and no proof can be adduced of the beginning or ending of *any* of its lines, the tract becomes a non-entity—the grant a nullity.

If a grant be made, not only with courses and distances, but with calls, it has a principle of self-sustentation, not possessed by grants with course and distance only, or with calls only.

Where a grant is by course and distance and calls, if the beginning, and any, or all the boundaries, *save one*, are lost and incapable of proof, the vitality of the grant still continues. This is the natural import of the express words of the grant.

It cannot be denied, that a valid survey or grant may be made without stating any natural object as being the *beginning* of its first line, if there be a boundary at the *termination* thereof.

It is no objection to the validity of a grant, that the place of its beginning is covered with water, whether navigable or otherwise; or that any of its lines run across such water.

In cases of grants of land, describing it by courses and distances and calls, the courts of this State have determined that, in locating them, they shall first be run by the calls; but if that be impracticable, they shall then be located by course and distance.

In an action of ejectment, the plaintiff, to prove the death of *O.* before the year 1745, without heirs, and intestate, offered in evidence a warrant of resurvey to *E. F.*, issued in 1725, a certificate of survey returned under such warrant, dated 21st September, 1726, but upon which no patent appeared to have been issued; and also an escheat patent relating to the same lands, granted 28th September, 1759, founded upon a special warrant of resurvey, dated 18th June, 1759, returned on the 30th of that month. The defendant objected to the admissibility of the warrant of resurvey to *E. F.* and certificate returned thereon, either with, or independent of the escheat patent of 1759, and proceedings, on which the same were founded. *Held*, the proceedings on that warrant not having been prosecuted, no purchase money being paid by *E. F.* nor patent accepted by him, neither the warrant nor certificate were proof of the facts recited in them, as to the death of *O.* at the time specified. Such statements were discredited, by the refusal of *E. F.* to consummate his title, and his omission or refusal to pay for the lands was evidence that he had discovered, that no title by escheat had devolved on the Lord Proprietary.

An exemplification of the return of the surveyor to a warrant of resurvey, dated 1707, with the depositions of witnesses, and inquisition of a jury called under the warrant of resurvey, executed on the 4th March, 1706-7—finding the beginning of a tract of land with its courses and distances, and other boundaries, recorded among the land records of *Baltimore* County, and certified under the seal of that County Court to be a true copy, is not evidence—because there existed, at the date of those proceedings, no law which authorized such proceedings to be recorded.

The proceedings in question were also inadmissible in evidence, because they purported to locate the tract of land described in them, in a way wholly inconsistent with the calls and expressions contained in its original patent.

Where a prayer called for an instruction to the jury, "that if they should find that the *beginning* of *B. V.* is not truly located on the plats by the defendant, then the plaintiffs are entitled to recover;" and it appeared that the *beginning of the tract claimed by them was admitted by the locations of both parties;* and that the patent for *B. V.* declared such *beginning* to be the *end* of its first line; and the bounded tree called for at the *beginning* of *B. V.* being lost, was to be found, *as a matter of law*, by reversing the course and distance of the first line of *B. V.*, the jury cannot find to the contrary,—and consequently the refusal to grant the prayer is not error.

By the act of 1745, ch. 9, the State granted no right which accrued to it subsequently to its passage.

An escheat grant by the State is no evidence of the existence of the facts constituting the escheat, anterior to the date of the warrant.

An escheat title accruing in 1759, will not entitle plaintiffs to recover, under the act of 1745.

A jury has no discretionary power to find, as matter of fact, that which is matter of law.

Expressions in a grant, intended merely as generally descriptive of locality, have not a conclusive and restrictive import.

By the grant of a tract of land, lying in *Chesapeake* bay, and on the *north* side of a river, called *P.*, and on the *north* side of the *north-west* branch of said river, beginning at a marked red oak, by a little branch, and running up along the north-west branch for breadth; it is not required that a tract—the *end* of whose first line was the *beginning* of the tract above described—should be located on the north side of the river *P.*

Where the witness had been surveyor of the county, (where land claimed is situated,) for *sirteen years*, and assistant of the county surveyor for many years previous, and testified that the beginning tree of a tract of land could not be found, that he had never heard of it, and had found the beginning, by reversing the course and distance of the patent from another boundary—this is sufficient evidence of an endeavor, on the part of the party seeking to establish the *lost beginning*, to find the position of the same.

The jury is the proper tribunal to decide whether any and what variation ought to be allowed in the location of lands.

Whether any and what degree of allowance for variation should be made, are questions of fact to be determined by the jury on testimony upon that subject adduced to them in the trial of the cause.

If no such testimony be offered, the jury are not authorized to depart from the courses and distances expressed in the conveyances, by making any allowance for variation.

Where there is a total absence of the testimony in relation to variation, the court ought not to instruct the jury on that subject.

Where the court reverses the judgment of the County Court for error in instruction as to a question of variation of the compass, and perceives that by no allowance for such variation which the jury could rationally have made, the merits of the controversy could be affected, it will not award a procedendo.

Where a line calls to terminate at a bounded tree without any other reference, and the tree is lost, and there is no location or evidence to prove that where such line, run course and distance, terminates, is not and always has been high and fast land, the court will not instruct the jury that the line cannot be run into the water of a navigable stream. The court will not presume that the bounded tree may not have stood in navigable water.

Where the beginning tree of a tract is admitted upon the plats, both parties are estopped from denying its location.

Where the termination of a line of one tract imperatively calls for the beginning tree of another, and the tree so called for is admitted as the beginning tree, it is equally admitted as the terminus called for.

Where there is error in a patent, either in the description of the tree alleged to stand at the *beginning* of the first line of the tract, or in the boundary stated to stand at the end of that line, where these descriptions are irreconcilable, and one or the other must be rejected,—under such circumstances, the court will enquire into the probabilities of mistake, as to the boundaries called for, and look at the consequences which would result from rejecting the one or the other.

There is no difference between the weight to be ascribed to a call for a boundary, or matter of description thereof, when referred to as the beginning of a tract, or as the terminus of one of its lines.

In determining upon such probabilities, the court will examine the courses, descriptions, calls and boundaries of the title papers, to ascertain if the surveyor made any mistake therein—what evidence he had before him, and what he designed to do.

An error of description in a survey, adopted in a patent, manifestly founded in mistake or falsehood, is insufficient to control other calls and expressions inconsistent therewith.

Where the assumption of mistake in a single description, harmonizes all the rest of a patent, the court will make such assumption.

The designed non-disclosure of the fact to the Lord Proprietary or his agents, that a warrant of resurvey as executed was covered by navigable water, is not a fraud, and will not vacate a patent issued thereon.

The rights of piscary and navigation remain unimpaired by the grant of land covered by navigable water.

For a fraud practised on the Lord Proprietary, he only, or those subsequently claiming under him, have a right to complain. It is not a matter on which his patentees may claim to expand their rights.

To produce accordance between a line and its call, the running of the next preceding line cannot be changed; such changes would be in conflict with the grant.

APPEAL from *Baltimore* County Court.

This was an action of *ejectment*, and was before this court in 1840.—11 *G. & J.* 354. It was brought by the appellants

against the appellees, for all that piece or lot of ground, situate on *Fell's Point*, in the City of *Baltimore*;—beginning for the same at the south-west intersection of *Wilks* and *Eden* streets, and running westerly on *Wilks* street eighty feet; thence southerly, parallel with *Eden* street, crossing *Lancaster* street, to the water; then easterly with the water, and parallel with *Wilks* street, eighty feet, to *Eden* street; and thence northerly with *Eden* street, to the beginning, containing six acres, with the appurtenances, situate and being in *Baltimore* County aforesaid, which *James Wilson*, and *Thomas Wilson*, and *Christopher Raborg*, and *Peter Eisenbury* had demised, &c.

The defendants pleaded *not guilty*, and took defence *on warrant*, and upon return of the plats "for all the land lying between the *south* side of *Alice Anna* street, and the *north* side of *Lancaster* street, and the *west* side of *Eden* street and *Canal* street."

1ST EXCEPTION. At the trial of this cause the plaintiff, to support the issue on his part, offered in evidence the plats and the explanations thereof, in this cause; and the following papers, to wit:

A patent to *Alexander Mountenay* of *Mountenay's Neck*, dated the 30th June, 1663.

An escheat patent of the same tract to *William Fell*, dated the 12th July, 1737.

A deed from *Edward Fell*, heir-at-law of *William Fell*, to *Thomas Sligh*, dated 17th August, 1758.

Deeds from *Sligh* to *Wiesenthal*; from *Wiesenthal* to *Cornthwaite*; from *Cornthwaite* to *David Brown*; from *Matthews*, attorney of *John Brown*, to *David Brown*; and, also, read in evidence the following agreement between the parties in this cause.

"We hereby agree that the present plaintiffs are the fee simple proprietors of the lot on the south side of *Wilks* street, as described in the deed from *William Matthews*, att'y for *John Brown*, according to its true location, and the defendants are the fee simple proprietors of the lots on west side of *Bond*

street, between *Alice Anna* and *Lancaster* streets, the leases of which they have located, and that the above admitted facts shall have the same effect, as if regularly proved before the jury."

The grant to *Alexander Mountenay*, from the Lord Proprietary for two hundred acres, in *Patapsco* river, "*Mountenay's Neck*," described a parcel of land, called "*Mountenay's Neck*," lying in *Chesapeake* bay, and on the north side of a river, *Patapsco;* and on the north side of the north-west branch of the said river: beginning at a marked *red oak*, by a little branch, and running up along the north-west branch for breadth, west north-west one hundred perches, over a cove unto a marked *white oak*, by a line drawn north north-east; running into the woods for length three hundred and twenty perches, by a line drawn from the said north north-east line; running east south-east one hundred perches, by a line from the said east south-east line; running south south-west unto the first marked red oak, three hundred and twenty perches, laid out for two hundred acres, more or less.

The escheat patent to *William Fell*, for *Mountenay's Neck*, dated 12th July, 1737, contained the following recitals and description of the land, viz:

"Whereas, *William Fell* of *Baltimore* County, by his petition to our agents for management of our affairs within this province, did heretofore set forth that there was escheat unto us a certain tract or parcel of land called *Mountenay's Neck*, lying and being in the county aforesaid, originally, on the 30th June, 1663, granted unto a certain *Alexander Mountenay*, for two hundred acres, under old rent; that afterwards, on the 22d March, 1685, a certain *Samuel Wheeler*, and *Ann*, his wife, by their indenture of bargain and sale, conveyed the said land to a certain *David Jones*, who died thereof possessed, intestate, and without heirs, by which means, or for want of heirs of the said *Alexander Mountenay*, or regular conveyances from the first taking up the same, is become escheat unto us as aforesaid; and the petitioner being the first discoverer thereof, humbly prayed to be admitted to its purchase, be the same escheat by the means aforesaid, or by any other ways or means

whatsoever, and a special warrant to resurvey the same, with liberty of adding any vacant land that could be found thereto contiguous, and that upon return of a certificate of such resurvey, he paying our agent such reasonable price as should be agreed upon for the purchase of said escheat, and making good rights to the vacancy added, might have our letters patent of confirmation issue unto him thereon, which was granted him,—and accordingly, a warrant on the 14th April, 1737, to him for that purpose did issue. In pursuance whereof, it is certified into our Land Office, that the said tract is resurveyed, by which it appears that the same contains the exact quantity of two hundred acres of escheat land, for which the said *William Fell* has paid and satisfied unto *Benjamin Tasker, Esq.*, our present agent and receiver general, for our use, the sum of £20 sterling, being the purchase money agreed upon for the said escheat, according to our instructions, bearing date at *Annapolis*, the 14th June, 1738, and registered in our Land Office of our said province. We do, therefore, in consideration thereof and other the premises, hereby give, grant and confirm unto him, the said *William Fell*, all that, the aforesaid tract or parcel of escheat land, now resurveyed and called *Mountenay's Neck*, lying and being in the county aforesaid: beginning at a bounded *white oak*, standing on the north side of the north-west branch of *Patapsco* river, and near the mouth of a small branch, descending into the north-west branch, which tree was bounded by Commissioners appointed to examine evidences concerning the bounds of the same tract of land, at the place where the original beginning tree did stand, and running thence up the said north-west branch, and over the mouth of a cove west north-west one hundred perches to a bounded *red oak*, at or near the place whereat the second bounded tree did stand, thence north north-east three hundred and twenty perches, east south-east one hundred perches, and thence south south-west, (as expressed in the grant,) unto the beginning, containing and laid out for two hundred acres, more or less, according to the certificate of resurvey thereof, taken and returned into our Land Office, &c.

The deed from *Edward Fell* to *Thomas Sligh*, dated 17th August, 1758, described him as son and heir-at-law of *William Fell*, and was for *Mountenay's Neck*, in fee.

The deed from *Thomas Sligh* to *Charles Weisenthal*, of 25th July, 1760, was in fee, for all that part of a tract or parcel of land called *Mountenay's Neck*, contained within the following metes and bounds, courses and distances, namely: beginning for the part hereby bargained and sold at the beginning of that part of said tract of land, hereby conveyed by the said *Thomas Sligh* unto a certain *Peter Lettick*, and running thence bounding on the said part north twenty degrees and thirty minutes, east forty perches and three-quarters of a perch, then north sixty-one degrees and fifteen minutes, east fifty-eight perches, unto the end of the north thirty-six degrees, west eighteen perches line of four acres, part of the aforesaid tract of land heretofore conveyed by the aforesaid *Thomas Sligh* unto a certain *Brian Philpot*, then bounding on that part, another part of said tract of land conveyed by the said *Sligh* to the said *Philpot*, until it intersects the first line of the whole tract called *Mountenay's Neck*, then bounding on that line east south-east sixty-four perches, unto the end of the south thirty-two degrees, east twenty-two perches and half a perch line of that part of said tract of land now in possession of a certain *Captain Thomas Hammond*, and then bounding on that part and the aforesaid part sold by the said *Thomas Sligh* to the aforesaid *Peter Lettick*, according to the several courses thereof unto the beginning aforesaid, containing eleven acres, more or less; together with, &c.

The deed from *C. Weisenthal* to *John Cornthwaite* of 7th December, 1775, was similar to that from *T. Sligh* to *C. W.*

The deed from *John Cornthwaite* to *David Brown*, of 8th July, 1782, was for all that piece or parcel of ground on *Fell's Point*, being a part of a tract of land called and known by the name of *Mountenay's Neck*, and lately annexed to *Baltimore Town*, and now called the *South-east Addition:* beginning at the intersection of *Wilks* street and *Eden* street, and running and bounding on *Wilks* street, west eighty feet; thence south,

parallel with *Eden* street to the first line of *Mountenay's Neck*, thence bounding on said line reverse, east south-east to *Eden* street, thence bounding on *Eden* street north to the beginning; together, &c. for ninety years renewable forever.

The deed from *William Matthews, attorney in fact for John Brown*, of *Philadelphia*, to *David Brown*, dated 23d December, 1793, was for the land described in the deed from *Cornthwaite* to *David Brown*, and was in fee.

And the plaintiffs further read in evidence the ordinance of the Mayor and City Council of *Baltimore*, passed the 11th March, 1823, entitled "An Ordinance for the improvement of the Cove," (and which ordinance and all the acts of Assembly in these exceptions referred to, it is admitted, may be read from the printed collections of ordinances and of acts of Assembly;) and also the following acts of Assembly, to wit: the act of 1745, (August session,) ch. 9; the act of 1773, ch. 4, (June session;) the act of 1784, ch. 39, (November session;) and further gave evidence, by *Alexander J. Bouldin*, the surveyor of *Baltimore* County, and by *James W. Collins*, *James Tracy* and ——— *Aler*, that the piece of ground claimed by the plaintiffs in this cause, together with nearly all the ground between, that is designated on the plat, between *Wilks* street and *Lancaster* street, and between *Caroline* street and *Harford* street, was filled up, and made fast land, under the before-mentioned ordinance of 1823; and that the piece of ground, claimed in this suit by the plaintiffs, was fast land, and enclosed in March, 1837; and also proved by said *Collins* and said *Bouldin*, that the water of the City Dock, as laid down on the plat is, and so far as they can remember for a number of years, has been deep and navigable; and the said *Bouldin*, in answer to a question on part of the defendants, whether he had ever heard of any other place as the beginning of "*Mountenay's Neck*," than that located for it on the plats? The said *Bouldin* said that he had heard that "*Mountenay's Neck*" was supposed to begin at H, or thereabouts; and the said plaintiffs also gave in evidence the plat of the addition to *Baltimore Town*, made under said act of 1773, ch. 4, and proved

that the same embraced "*Mountenay's Neck*," so far as the same was then fast land, and the ground, (northward of *Wilks* street, and of the improvement now claimed,) then in those under whom the plaintiffs claim.

And thereupon, the defendants, to prove the issue on their part, offered in evidence the following patents, to wit: of "*Bold Venture*," granted to *John Oulton* on the 20th March, 1695; of "*Long Island Point*," granted to *William Poultney*, 10th July, 1671; of "*Island Point*," granted to *William Fell* on the 5th June, 1734.

The patent to *John Oulton*, granted 20th March, 1695, was for all that tract or parcel of land called "*Bold Venture*," lying on the north side of *Patapsco* river, and on the north side of *Whetstone Branch*, beginning at a bounded white oak, standing by the branch side—it being a bound tree of *Poultney's Point*, and running thence north north-east fifty-eight perches, to a bound red oak of *Mountenay's Neck;* then with *Mountenay's* land, west north-west one hundred perches, to a bound white oak of *Mountenay's;* then with *Mountenay's* long line north north-east three hundred and twenty perches; then west north-west fifty-four perches; then south south-west three hundred and twenty perches, to a bound ash; then south south-west two degrees, southerly twenty-four perches, to the river side; then down the river, south south-east two degrees easterly, eleven perches; then south south-west two degrees, southerly twenty-four perches; then with a direct line to the first tree, containing, and now laid out for one hundred and sixty-one acres of land, more or less, according to the certificate of survey thereof, taken and returned into our Land Office, bearing date the 23d December, 1695, and there remaining, together, &c.

The patent to *William Poultney* was dated 10th July, 1671, and was for all that parcel of land, called "*Long Island Point*," lying in *Baltimore* County, on the north side of *Patapsco* river, and on the north-west branch of the river—beginning at a bounded locust, standing at the head of a round bay, and running down the said bay south south-west eighty

perches, to a bounded *Spanish* oak at the mouth of the said bay, and from the said oak, up the said branch north-west thirty-six perches; then west south-west one hundred perches; then west north-west seventy-two perches, to the bottom of "*Long Island Point;*" then north north-east sixteen perches; then east and by south sixty perches; then north and by east eighty perches, *to a bounded red oak of a parcel of land, laid out for Alexander Mountenay;* then north north-east by *Mountenay's* land seventy-six perches, and then to the first bounded tree, containing, and now laid out for one hundred acres of land, more or less, together, &c.

The patent to *William Fell* was as follows:

CHARLES, &c. Know ye, that whereas *Charles Carroll*, of the City of *Annapolis*, in *Anne Arundel* County, Chirurgeon, by his humble petition to our agent for management of land affairs within this province, did heretofore set forth, that a certain *William Poultney*, of *Baltimore* County, deceased, was possessed of a tract of land, called "*Island Point*," situate on a branch of *Patapsco* river, granted unto the said *Poultney*, for one hundred acres, by patent, bearing date 10th July, Anno Domini, 1671, and died thereof possessed, Anno 1674; and although an alien, made a will, and devised the same to *Edward Monfrett*, likewise an alien, in the words:

Item. "I give and bequeath unto *Edward Monfrett*, of *Patapsco*, all my lands, goods and chattels," whereby the said *Monfrett*, as the petitioners conceived, had but an estate for life; although that he, the said *Poultney*, was capable of devising the said land,—and that after the decease of the said *Monfrett*, the said land would come to the heirs of the said *Poultney;* but so it was, that no heirs of the said *Poultney* or *Monfrett* had since appeared to claim the said land; by means whereof, or some other causes before set forth, the petitioner conceived the same become escheat unto us as aforesaid; and inasmuch as the petitioner had been the first discoverer, prayed to be admitted to its purchase, and a special warrant to resurvey the same, with liberty of adding what vacant land could be found to the same contiguous; and that upon return

of a certificate of such resurvey, he paying our agent such reasonable price as should be agreed upon for the purchase of said escheat, and complying with all other requisites, according to our conditions of plantation then in force, might have our letters patent for the whole, be the said "*Island Point*," escheat by means aforesaid, or any other, which was granted him. And accordingly, a warrant on the 12th September, 1733, to him, for that purpose, did issue. In pursuance whereof, it is certified into our Land Office, that the said tract is resurveyed, by which it appears that the whole now contains the quantity of eighty-five acres; whereof fourteen acres is vacant land added, for which said escheat and vacancy, the said *Charles Carroll* has, according to our instructions to *Edmund Jennings, Esq.*, our present Judge of our Land Office, bearing date at *Annapolis*, 14th June, 1733, paid and satisfied unto *Daniel Dulany, Esq.*, our present agent and Receiver General, for our use, as well as the sum of £7 sterling, being one-third part of the value set on the said escheat, as also the sum of 6 shillings sterling, for the rights to the vacancy added; but before our grant thereon to him did issue, he, the said *Charles Carroll*, did, on the 4th June, 1734, for a valuable consideration, assign, sell, transfer and make over unto *Wm. Fell*, of *Baltimore*, his heirs and assigns forever, all his right, title and interest of, in and to the said land, and the certificate thereof, who has supplicated us that our letters patent of confirmation may now issue unto him, which we have thought fit to condescend unto; and we do, in consideration thereof, and other the premises, hereby give, grant and confirm unto him, the said *Wm. Fell*, all that, the aforesaid tract or parcel of escheat land, with its vacancy added, now resurveyed, and still called "*Island Point*," lying and being in *Baltimore* County, beginning at a bounded white oak, standing at the head of a round bay, on the north-west branch of *Patapsco* river, said oak standing by the spot where it is supposed stood a bounded locust, the ancient beginning tree of the said land: same white oak being north four degrees, east sixty-six perches from the mouth of the said bay, and running from the aforesaid white

oak, south four degrees, west sixty-six perches, thence south sixty-three degrees, west fourteen perches, thence north forty degrees, west thirty perches, thence north eighty-seven degrees, west forty-two perches, thence south fifty degrees, west fifty-six perches, thence south seventy-three degrees, west twenty-four perches, thence north fifty-five degrees, west fifty-four perches, thence north forty-five degrees, east sixteen perches, thence south eighty degrees, east sixty-four perches, thence north three degrees, east eighty perches, thence north north-east seventy-six perches, and thence by a straight line to the said beginning, containing and now laid out for eighty-five acres of land, more or less, according to the certificate of re-survey, thereof taken and returned into our Land Office, bearing date the 20th February, 1733, and there remaining, together, &c.

And proved, that they were truly located on the plats; and further proved by said *Bouldin*, surveyor of *Baltimore* County, that the beginning tree of "*Bold Venture*," could not be found; that he had never heard of any such tree, and *that he found the beginning of "Bold Venture" in the defendant's location, by reversing the first line from the admitted beginning at M, of "Mountenay's Neck.*" And also proved by said *Bouldin*, that the lot to which the improvement in the case is claimed as an appurtenance or extension, was not included within the lines of the addition to *Baltimore Town*, as laid out under the act of Assembly aforesaid, of 1773—said addition extending only to the lands on the banks of the river, as located on the plats in this cause, from black A to Z. And that witness had been surveyor of the county for sixteen years, and was his father's assistant for many years, who was also for some twenty years the surveyor of *Baltimore* County. And the defendant also proved, that in 1783, the water ran as marked on the plats with blue shaded lines, from A to B to C to D, and in 1801, by the shaded line from G to H to I to J and to K. And the defendant further read in evidence the ordinance of the Mayor and City Council of *Baltimore*, passed the 4th May, 1841, entitled "An Ordinance to grant permission to certain persons

to extend their lots from *Wilks* street and *Bond* street, unto the water."

The plaintiffs thereupon further to support the issue on their part, and *to prove the death of John Oulton* before the year 1745, without heirs and intestate, offered in evidence the warrant of resurvey to *Edward Fell*, granted in the year 1725, and the certificate thereon and in connection therewith, for the purpose of proving the death of said *Oulton*, without heirs and intestate, as aforesaid, offered to read in evidence the warrant, certificate and patent of "*Rogers' Inspection;*" which warrant, certificate and patent are as follows, to wit:

"*January* 8*th*, 1725. Whereas, *Mr. Edward Fell*, of *Baltimore* County, by his humble petition to his Lordship's agent for the management of land affairs within this province, has set forth, that there is escheat unto his Lordship, a small tract or parcel of land, lying and being in *Whetstone Branch*, now called *North-west Branch*, in *Baltimore* County aforesaid, called the "*Adventure*," containing one hundred and sixty one acres, originally, on the 20th March, Anno Dom. 1695, granted to *John Oulton*, who died thereof possessed, intestate and without heirs, by which means the same became escheat as aforesaid; and the petitioner, being the first discoverer thereof, prayed to be admitted to its purchase, and a special warrant to resurvey the same; and that upon return of a certificate of such resurvey, he might have his Lordship's letters patent of confirmation issue unto him for the same, which is granted him; provided he pay unto his Lordship's agent such reasonable price as shall be agreed upon for the purchase thereof; comply with all requisites, and finally sue out his Lordship's letters patent of confirmation thereon, within two years after date hereof.

"Lay out therefore, for, and carefully resurvey, and in the name of him, the said *Edward Fell*, the aforesaid tract of escheat land, according to its ancient metes and bounds, including surplus; and by your outlines, adding what vacancy you can find to the same contiguous, whether cultivated or otherwise, not running your lines, &c."

BALTIMORE COUNTY. By virtue of a special warrant of escheat, granted unto *Edward Fell*, of *Baltimore* County, out of his Lordship's Land Office, bearing date January 8th, 1725, as appears, &c. These are therefore to certify, that I, *Richard Gist, deputy surveyor under Thomas Addison, Esq., surveyor general of the Western Shore of this province*, have resurveyed for him, the said *Edward Fell*, a parcel of land formerly called, "*Bold Adventor*," and now called "*Fell's Footing*," lying in *Baltimore* County, on the north side of *Patapsco* river: beginning at a bounded red oak, standing at the end of the west north-west line of the land formerly laid out for *Alexander Mountenay;* it being the beginning boundary of the land called "*Folly*," and "*Cole's Harbor;*" this day surveyed for *Mr. Edward Fell* of this county; and runs thence south sixty-seven degrees, thirty minutes, east nineteen perches; thence south thirty-seven degrees, west six perches; thence north fifty-six degrees, west twenty-eight perches; then west twenty-three perches; thence north forty-five degrees, west six perches; thence north thirty-two degrees, west thirteen perches; thence north fifteen degres, east nineteen perches; thence by a direct line to the first boundary, containing and now laid out for four and three-quarters acres of land, more or less; to be holden of the manor of *Baltimore.*

Surveyed, September 21, 1726.

Per RICHARD GIST, *Dep'ty Surv'r.*

"*Fell's Footing*" contains four and three-quarter acres, pr scale thirty ps in an inch. This tract is all cleared and *worne* out, and without any improvement, except about thirty *auld fence loggs.* J. Ross, *Ex'r.*

Examined and passed.

April 27, 1759. Whereas, *William Rogers*, of *Baltimore* County, by his humble petition to his Lordship's agents for management of land affairs within this province, did set forth, that a certain *John Boreing* had, on the 20th April, 1742, surveyed and laid out for him a tract or parcel of land, called "*Boreing's Convenience,*" lying and being in the county afore-

said, containing seventy-five acres, by virtue of an assignment for that quantity from *Thomas Sheredine*, being part of a warrant for four hundred acres, granted said *Sheredine* the 24th Oct., 1741, as per the certificate thereof returned into the Land Office, might appear. The petitioner further showed, that the said certificate had laid ever since in the office postponed, and no patent had ever yet issued thereon; and as the two years for suing out such grant was expired, the petitioner was advised, that by sundry of his Lordship's proclamations published, the certificate aforesaid was become null and void; and the land and premises therein mentioned subjected to the benefit of the first discoverer, &c. Inasmuch as the petitioner was the first discoverer, and desired to take up and pay for the same, humbly prayed a special warrant to resurvey the aforesaid tract, with liberty of adding any contiguous vacancy; and that on return of a certificate of such resurvey, he paying the caution money and complying with all other requisites usual in such cases, might have his Lordship's grant issue unto him thereon, which was granted him; provided, he sues out such grant within two years from the date hereof. Lay out therefore, and carefully resurvey, for, and in the name of him, the said *William Rogers*, the aforesaid tract or parcel of land, according to its ancient metes and bounds; nevertheless, correcting and amending any errors in the original survey; and by your outlines, adding any vacant land you can find thereon contiguous, whether cultivated or otherwise, not running your lines, &c. Renewed in folio 240. 18th June, 1759. Whereas, *William Rogers*, of *Baltimore* County, had on the 27th April last, granted him a special warrant on the proclamation for the effecting and securing a tract of land, called "*Boreing's Convenience*," as in folio 175 appears; but the said warrant, not being yet executed, *it is this day renewed and continued in force for six months longer from the date hereof, with liberty of including an escheat tract, called "Bold Venture," contiguous to the former tract, originally granted unto a certain John Oulton, for one hundred and sixty-one acres, who died seized thereof, intestate, and without heirs, by which means the same became*

escheat to his Lordship; and forasmuch as the petitioner was the first discoverer, and desired to purchase the aforesaid tract, be it escheat by the means aforesaid, or by any other ways or means whatsoever.

Signed per order, THOS. JENNINGS, *Clk.*

BALTIMORE COUNTY, *ss.* By virtue of a special warrant granted out of his Lordship's Land Office, on the 27th April, 1759, to resurvey for *William Rogers*, of *Baltimore* County, a tract or parcel of land called "*Boreing's Convenience*;" on the 20th April, 1742, surveyed and laid out for a certain *John Boreing*, for seventy-five acres, who never sued out a grant thereon; and by outlines, to add any vacant land thereto contiguous, whether cultivated or otherwise; which warrant not being executed, it was on the 18th June, 1759, renewed, and continued in force for six months longer from that day, with liberty of including an escheat tract, called "*Bold Venture*," lying and being contiguous to the above mentioned tract, originally, on the 20th March, 1695, granted unto a certain *John Oulton*, for one hundred and sixty-one acres; who died seized thereof, intestate, and without heirs, by which means the same became escheat. I, *Nicholas Ruxton Gay*, deputy surveyor of *Baltimore* County, have carefully resurveyed and laid out for, and in the name of him, the said *William Rogers*, the two aforesaid tracts or parcels of land, according to their ancient metes and bounds: beginning for "*Boreing's Convenience*," at, &c. Beginning for "*Bold Venture*," south south-west fifty-eight perches, distant from a bounded post, set in the ground, where it was formerly proved a bounded red oak, the beginning tree of a tract of land called "*Mountenay's Neck*," did originally stand; and running thence north north-east fifty-eight perches, unto the said beginning post of *Mountenay's Neck;* then with that land, as expressed in the original certificate of "*Bold Venture*," west north-west one hundred and thirty-two perches, unto a bounded *white oak* of said land; then still with said land, (as likewise expressed in the certificate of *Bold Venture*,) north north-east three hundred and

twenty perches; then west north-west fifty-four perches; south south-west three hundred and twenty perches; south twenty degrees and thirty minutes, west twenty-four perches; south twenty-four degrees and thirty minutes, east eleven perches; south twenty degrees and thirty minutes, west twenty-four perches; and then with a straight line to the place of beginning, containing and laid out for one hundred and seventy-three acres and the fourth part of an acre, more or less; one hundred and fifty-two acres and the fourth part of an acre, part whereof lyeth in elder surveys and *navigable water.*

I also certify, that I have excluded such part of *Boreing's Convenience*, as lyeth in elder surveys, and such part of *Bold Venture, as lyeth in elder surveys and navigable water;* and have added to the residue of said tracts of land, the quantity of five acres of other vacant land; *but forasmuch as elder surveys and navigable water cut the tract called "Bold Venture" into two parts*, I cannot reduce the whole into one entire tract, as by the warrant I am commanded; for which reason I have reduced all the part of the tract of land called "*Boreing's Convenience*," clear of elder surveys, with five acres of other vacant land, and eighteen acres and one-fourth part of an acre, part of the escheat tract thereto contiguous, into one entire tract; and the remaining two acres and three-quarters of an acre, part of the aforesaid escheat tract, which lies clear of elder surveys and navigable water, into another separated tract, both bounded as follows, *viz*: lying in *Baltimore* County, on the north-east side of the north-west branch of *Patapsco* river: beginning for the first mentioned part in the east line of a tract of land called "*Todd's Range*," and where the said east line of "*Todd's Range*" intersects the west side of "*Jones' Falls;*" and running thence, bounding on and with the said east line of "*Todd's Range*," east one hundred and ninety-eight perches, until it intersects the south south-west three hundred and twenty perches line of the original escheat tract called "*Bold Venture;*" then bounding on and with that line south south-west twenty-nine perches, until it intersects the east line of a tract of land called "*Cole's Harbor;* then bounding on

and with that line of "*Cole's Harbor*," east sixty perches, until it intersects the north north-east three-hundred and twenty perches line of a tract of land, called "*Mountenay's Neck;*" thence bounding on that line to the end thereof, north north-east forty-four perches; then west north-west fifty-four perches, unto the end of the west north-west fifty-four perches line of the original escheat tract, called "*Bold Venture;*" then south south-west twenty perches, until it intersects the east one hundred and eighty-one perches line of a tract of land called "*Garron Barrow;*" then bounding on that line reverse of the same, west one hundred and twenty-two perches, unto the end of the south six degrees, west thirty-seven perches line of the said land; then bounding on that line reverse of the same, north six degrees, east twenty-nine perches and three-quarters of a perch, until it intersects the east line of a tract of land called "*Hanson's Wood Lot;*" then bounding on that line reverse of the same, west twenty-one perches and half a perch, until it intersects the south by west line of a tract of land called "*Salisbury Plains;*" then bounding on and with that line to the end thereof, south by west thirty-nine perches; then bounding on and with the given line of "*Salisbury Plains,*" north forty-one degrees and thirty minutes, west ninety-one perches and half a perch, until it intersects the given line of a tract of land called "*Lunn's Lot;*" and then with a straight line to the place of beginning, containing and laid out for fifty acres and the fourth part of an acre, more or less. Beginning for the other part at a bounded white oak, standing near the side of the north-west branch of *Patapsco*, it being *the second bounded tree* of a tract of land called "*Mountenay's Neck;*" and running thence bounding on the said land east south-east seventy-one perches, unto a creek of the said north-west branch; then bounding down with the said creek south twenty degrees, west seven perches, unto the mouth of said creek; then bounding upward on said north-west branch the four following courses, *viz:* north fifty-eight degrees, west thirty-five perches; south eighty degrees, west sixteen perches; north seventy-four degrees, west ten perches; north

thirty-three degrees, west twenty perches, and then with a straight line to the beginning, containing and laid out for two acres and three-quarters of an acre, more or less, and containing and laid out in the whole in both the aforesaid parts for fifty-three acres, more or less, to be held of the manor of *Baltimore*, by the name of "*Rogers' Inspection.*" June 30, 1759.

N. RUXTON GAY, *D. S. B. C.*

A is the beginning of "*Boreing's Convenience.*"

B *is the beginning of* "*Bold Venture.*"

C is the beginning of one of the parts of the resurvey, containing 50¼ acres.

D is the beginning of the other part of the resurvey, containing 2¾ acres.

"*Boreing's Convenience*" was originally surveyed for		75 a.
Deficit in measure, ...		1¼
		73¾
Loses in "*Bold Venture*," and other elder surveys,		46¾
		27
"*Bold Venture*" was originally granted for	161	
Contains surplus, ...	12¼	
		173¼
Loses in elder surveys and water, . . .		152¼
		21
Vacant land added, ...		5
"*Rogers' Inspection*,"		53

N. B. About three acres of "*Boreing's Convenience*," is cleared and cultivated; there is thereon forty-eight young apple trees, and about one hundred and fifty panels of old fence, most of the rails quite rotten. The escheat land is of a middling quality, without any cultivations or improvements; has no rail or clapboard timber on it, and but little other sort of wood.

N. RUXTON GAY, *D. S. B. C.*

On the back of the aforegoing certificate was the following endorsements and receipt, viz:

20th October, 1759: Examined and passed,

J. Ross, *Exam'r.*

I have received the sum of two pounds two shillings for the within escheat land, one pound twelve shillings for the within vacancy, and one pound ten shillings for the improvements. Patent may therefore issue with his Excellency's approbation.

28th September, 1759. Approved, EDWARD LLOYD.

Patented *28th September*, 1759. H. SHARPE.

In testimony that the aforegoing is a true copy from the original certificate and plat belonging to and remaining in the *Western Shore* Land Office of *Maryland*,

[SEAL.] I have hereunto set my hand and affixed my official seal this 17th October, 1842.

GEORGE G. BREWER, *Reg. Ld. Off. W. S. Md.*

Mr. *William Rogers'* pat. 53 as *Rogers' Inspection.*

FREDERICK, &c. Know ye, that whereas *William Rogers*, of *Baltimore* County, by his humble petition to our agent for management of land affairs within this province, did set forth, that a certain *John Boreing* had, on the 20th April, 1742, surveyed and laid out for him a tract or parcel of land called "*Boreing's Convenience*," lying and being in the county aforesaid, containing seventy-five acres, by virtue of an assignment for that quantity from *Thomas Sheredine*, being part of a warrant for four hundred acres, granted said *Sheredine* the 24th October, 1741, as per the certificate thereof taken and returned in the Land Office might appear. The petitioner further shewed that the said certificate had laid over since in the office postponed, and no patent had ever yet issued thereon, and as the two years for sueing out such grant was expired, the petitioner was advised that by sundry of our proclamations published, the certificate aforesaid was become null and void, and the land and premises thereon mentioned subjected to the benefit of the first discoverer; and inasmuch as the petitioner was the first discoverer, and desired to take up and pay for the same, humbly prayed a special warrant to resurvey the aforesaid tract, with the liberty of adding any contiguous vacancy, and return of a certificate of such resurvey, he paying the caution money and complying with all other requisites usual in such

cases, might have our grant issue unto him thereon, which was granted him, and accordingly a warrant on the 27th April, 1759, unto him for that purpose did issue; but the said warrant, not being yet executed, it was, on the 18th June, 1759, renewed and continued in force for six months longer from that date, with liberty therein given to include a certain tract of escheat land called "*Bold Venture*," contiguous to the former tract originally granted unto a certain *John Oulton* for one hundred and sixty-one acres, died seized thereof intestate and without heirs, by which means the same became escheat to us, humbly prayed to be admitted to the purchase of the said escheat, being it escheat by the means aforesaid for any other ways or means whatsoever: In pursuance whereof, it is certified in our Land Office that the aforesaid tracts or parcels of land are surveyed, by which it appears that that tract called "*Boreing's Venture*," clear of elder surveys, contains no more than the quantity of twenty-seven acres; and that parcel of escheat land called "*Bold Venture*," also clear of elder surveys, contains no more than the quantity of twenty-one acres; and that there is the quantity of five acres of vacant land added, for which he has paid and satisfied unto *Edward Lloyd, Esq.*, our present agent and receiver general, as well the sum of one pound twelve shillings for said vacancy, as the sum of two pounds two shillings, being the purchase money agreed upon for the said escheat: In consideration whereof, and other, the premises, we do therefore hereby grant and confirm unto him, the said *William Rogers*, all them the aforesaid two tracts or parcels of land now resurveyed and called "*Rogers' Inspection*," beginning for the first mentioned part in the east line of a tract of land called "*Todd's Range*," and where the said east line of "*Todd's Range*" intersects the west side of "*Jones' Falls*," and running thence bounding on and with the said east line of "*Todd's Range*," east one hundred and ninety-eight perches, until it intersects the south south-west three hundred and twenty perches line of the original escheat tract called "*Bold Venture;*" then bounding on and with that line south south-west twenty-nine perches, until it intersects the east line of a tract

of land called "*Cole's Harbor*;" then bounding on and with that line of *Cole's Harbor* east sixty perches, until it intersects the north north-east three hundred and twenty perches line of a tract of land called "*Mountenay's Neck*;" then bounding on that line to the end thereof north north-east forty-four perches, then west north-west fifty-four perches, unto the end of the west north-west fifty-four perches line of the original escheat tract called "*Bold Venture*;" then south south-west twenty perches, until it intersects the east one hundred and eighty-one perches line of a tract of land called "*Garron Barrow*;" then bounding on that line, *reverst* of the same, west one hundred and twenty-two perches, unto the end of the south six degrees, west thirty-seven perches line of said land; then bounding on that line reverse of the same, north six degrees, east twenty-nine perches and three-quarters of a perch, until it intersects the east line of a tract of land called "*Hanson's Wood Lot*;" then bounding on that line, reverse of the same, west twenty-one perches and half a perch, until it intersects the south by west line of a tract of land called "*Salisbury Plains*;" then bounding on and with that line to the end thereof south by west thirty-nine perches; then bounding and with the given line of "*Salisbury Plains*," north forty-one degrees and thirty minutes, west ninety-one perches and half a perch, until it intersects the given line of a tract of land called "*Lunn's Lot*;" and then with a strait line to the place of beginning—containing and laid out for fifty acres and the fourth part of an acre more or less: beginning, for the other part, at a bounded *white oak* standing near the side of the north-west branch of *Patapsco*, it being the second bounded tree of a tract of land called "*Mountenay's Neck*," and running thence, bounding on the said land east south-east seventy-one perches, unto a creek of the said north-west branch; then bounding down with the said creek south twenty degrees, west seven perches, unto the mouth of said creek; then bounding upward on said north-west branch the four following courses, viz: north fifty-eight degrees, west thirty-five perches, south eighty degrees, west sixteen perches, north seventy-four degrees, west ten perches, north

thirty-three degrees, west twenty perches, and then with a straight line to the beginning—containing and now laid out for two acres and three-quarters of an acre, more or less, and containing and laid out in the whole in both the aforesaid parts for fifty-three acres, more or less, according to the certificate of survey thereof, taken and returned into our Land Office, bearing date the 30th June, 1759, and there remaining, together, &c. Given, &c. this 28th September, 1759.

The defendants objected to the admissibility of said warrant to *Edward Fell*, and the certificate thereon, as evidence to prove the death of said *Oulton*, intestate and without heirs, before the year 1745, either alone or in connection as aforesaid with said certificate, warrant and patent of *Rogers' Inspection;* and the Court (ARCHER, C. J. and LE GRAND, A. J.) refused to admit said warrant to *Edward Fell*, and the certificate thereon, to be read in evidence for the purpose aforesaid. The plaintiff excepted.

2D EXCEPTION.—The plaintiffs and defendants having respectively offered the testimony stated in the aforegoing bill of exceptions, and which is made part of this, the plaintiff further offered to read in evidence, for showing (alone, or in connection with the evidence already offered in this case) that "*Bold Venture*" is not correctly located by the defendants, the following record of resurvey in the matter of "*Bold Venture*," the finding of the jury, under which it is admitted is located by the plaintiffs on the plats as follows, to wit: from M to H, to *Bold Adventure*, one hundred and sixty-one acres.

By virtue of a warrant granted out of *Baltimore* County Court, to *Capt. John Oulton*, to ascertain the ancient metes and bounds of a tract of land called the "*Bold Adventure*," I, *Richard Colegate, Queens' surveyor of the said county*, have, in the presence of the sheriff of the said county, and by the directions of a jury, whose verdict is hereunto annexed, laid out the said land: beginning at a bounded *white oak*, standing on the north side of a branch called *Jones'*, which *white oak* is judged by the said jury to be the first bounds of the *Bold*

Venture; and running thence north north-east fifty-eight perches, near a bounded *red oak;* then west north-west one hundred perches, into a small run; then north north-east three hundred and twenty perches; then west north-west fifty-four perches; then south south-west three hundred and twenty perches, near to a bound ash; then south south-west two degrees, southerly twenty-four perches, to the river side; then down the river, south south-east two degrees, easterly, eleven perches; then south south-west two degrees, southerly twenty-four perches; then with a direct line to the first bounds, containing, and now laid out for one hundred and sixty-one acres, more or less. Per RICHARD COLEGATE,

May 10*th*, 1707. *Queen's Surveyor, Baltimore County.*

The deposition of *John Cole*, aged about thirty-eight years or thereabouts, did declare, that about fourteen years ago, the said *John Oulton* did take up this said land called *Bold Venture*, and did begin at this tree and run to a *red oak*, and from thence to a *white oak;* for he sayeth that he can very well remember it, for he carried the one end of the chain; and further sayeth not.

May 10*th*, 1707. S. FRA DALLAHIDE, *Sheriff.*

The deposition of *Richard Miller*, aged about forty-one or thereabouts, did declare, that about fourteen years past, the said *John Oulton* did take up this said land called *Bould Adventure*, and did begin at this tree and run to a *red oak*, and from thence to a *white oak;* for he sayeth that he can very well remember it, for he carried the one end of the chain; and further sayeth not.

May 10*th*, 1707. S. FRA DALLAHIDE, *Sheriff.*

May 10th, 1707. By virtue of a warrant of resurvey, granted out of *Baltimore* County Court, bearing date the 4th March, Anno 1706–7, unto *Capt. John Oulton*, for the same county, for to resurvey a certain tract of land called the *Bold Adventure*, containing one hundred sixty-six acres. Now we of the jury, having heard the oaths of *John Cole* and *Richard Miller*, being sworn upon the Holy Evangelist, do say that the

said land must begin with a bounded *white oak*, standing on the north side of a branch called *Jones' Branch*, being the first tree named in the patent; and from thence north north-east fifty-eight perches to a bounded *red oak*, it being a bounded tree of *Mountenay's* land; and from thence with *Mountenay's* land west north-west one hundred perches, to a bounded *white oak* of *Mountenay's* land; then with the said *Mountenay's* long line north north-east three hundred and twenty perches; then north-west fifty-four perches; then south south-west three hundred and twenty perches to a bounded *ash*; and so according to all the ancient metes and bounds else that belongs to the said land. In witness whereof, we, whose names are under written, have set our hands and fixed our seals the day and year above written.

S. FRA DALLAHIDE, *Sheriff.*

JOHN THOMAS, [Seal, &c.]

BALTIMORE COUNTY, *to wit:* I hereby certify that the foregoing is a true copy from the Land Records of *Baltimore* County, Liber H. W., No. 5.

In testimony whereof, I have hereto subscribed my name [SEAL.] and affixed the seal of *Baltimore* County Court this 17th September, 1846.

A. W. BRADFORD, *Clerk Balt. Co. Court.*

And it being further admitted and agreed that said location is to be considered as located by the defendants by the location as relied on by them made by them of *Bold Venture.* And the plaintiffs further offered to prove the truth of their said location; but the defendants objected to the admission in evidence of said record of resurvey, as inadmissible as evidence in this cause for any purpose; and secondly, if admissible at all, as inadmissible for the purpose of altering or controlling the calls of the said patent of "*Bold Venture,*" or varying the true construction of said patent; and the Court (ARCHER, C. J. and LE GRAND, A. J.) was of opinion that the said record of resurvey was inadmissible in evidence and refused to admit the same.

The plaintiffs excepted.

3D EXCEPTION.—The plaintiffs and defendants having respectively given the testimony stated in the aforegoing bills of exceptions, and which is made part of this, the plaintiffs, for the purpose of proving that *John Oulton*, the patentee of "*Bold Venture*," was, at the date of the patent for "*Rogers' Inspection*," dead, without heirs and intestate, offered in evidence said patent for "*Rogers' Inspection*," set forth in the first bill of exceptions: and thereupon, the plaintiffs prayed the Court to direct the jury as follows:—

1st. If the jury shall find from the evidence, that a patent was granted by the State of *Maryland* to *Alexander Mountenay*, on the 30th June, 1663, the escheat patent granted to *William Fell*, on the 12th July, 1737, and that *Edward Fell*, was heir-at-law to said *William*, and the deed from *Edward Fell* to *Thomas Sligh*, dated the 17th August, 1758, and that said *Fell* was the owner of *Island Point* and *Fell's Prospect;* and if the jury also find the deed of the 25th July, 1760, from said *Thomas Sligh* to *Charles Weisenthal;* the deed from said *Weisenthal* to *John Cornthwaite*, of the 7th December, 1775; the deed from *John Cornthwaite* to *David Brown*, of the 8th July, 1782; and the deed from *William Matthews*, attorney in fact of *John Brown*, to *David Brown* of the 13th December, 1793; and also the agreement between the attorneys for the plaintiffs and defendants in this cause; and the ordinance of the City of *Baltimore*, given in evidence of the year 1823; and shall also find from the evidence, that under said ordinance the ground was filled up by the city authorities, and that the land in dispute in this cause was made fast land, and raised above high-water mark, and was fenced in by the defendants before the impetration of the writ in this cause; and if the jury shall find that the beginning of *Bold Venture* is not truly located on the plats by the defendants, or if truly located, they shall find that the title to said tract became vested in the State by escheat in 1759, then the plaintiffs are entitled to recover.

2d. That before the plaintiffs in this cause can be barred from their recovery by reason of the patent of *Bold Venture*, the defendants must shew title in the State, or such outstanding

title in some third person to said tract, as would enable him to recover in ejectment against both the contending parties in this case.

3d. That the jury must find that the tract of *Bold Venture* has been truly located by the defendants, and that they cannot so find, unless they find that the beginning of said tract is properly located, and in order to that conclusion, must find that the same is located on the north side of *Patapsco* river.

4th. That the beginning cannot be found for "*Bold Venture*" by reversal of the line from the first established boundary, unless the jury be satisfied that the beginning tree could have stood at the point to which the reversal would carry the line, to wit, at the point red A on the plat; and that if the jury believe that at and about the point A, at the period of the survey for the patent of "*Bold Venture*," the water of the *Patapsco* river flowed, and the water line of said river was as laid down for the several periods on the plat, then the jury cannot find that the tree could have stood at said point A.

5th. That the defendants have offered no sufficient evidence of the location of "*Bold Venture;*" because they have offered no testimony of any endeavor being made to find the beginning of the tract, and because they have not located *Whetstone Branch*, that being the place on which said beginning is described in the patent to be, and where said beginning tree should have been sought for.

6th. That the defendants have not truly located "*Bold Venture*," if the jury shall find from the testimony that the line from M to A should have been run with allowance for variation, and has not been run so, and that they must so find if they believe the testimony of *Mr. Bouldin.*

7th. That the defendants have not truly located "*Bold Venture*," inasmuch as they cannot run the fifth line of that tract, as they have located it on the plats, further than to the river side, as designated on the plat by a black broken line, shaded blue, a little distant from Z, and south-westerly thereof.

8th. If the jury find from the evidence that the first bound or beginning tree of *Mountenay's Neck* was a *red oak*, and

stood at the spot marked on the plats as black M; and if the jury believe that said tree was a bound tree of "*Long Island Point*," and the only *red oak* which was among the bound trees of said tract; and if the jury find from the evidence in this cause, that said *red oak* was destroyed, and a *white oak* standing at the same spot was then made the beginning bound tree of *Mountenay's Neck*, and a bound tree of "*Long Island Point*," as a substitute for said *red oak*; and if the jury believe that said *white oak* was the tree referred to in the patent of *Bold Venture* as a bound tree of "*Poultney's Point*;" and if the jury believe from the evidence that "*Poultney's Point*" and *Long Island Point*" are the same tract under different names, then they are bound to find the beginning tree of "*Bold Venture*" at M.

9th. That the jury must find that the *red oak* called for at the termination of the seventh line of *Long Island Point*, in the patent of that tract, (as a bounded *red oak* of a parcel of land laid out for *Alexander Mountenay*,) stood as it is located on the plats at M.

10th. That if the jury believed a *white oak* was substituted in the place of the *red oak* mentioned in the preceding prayer, as a boundary of *Long Island Point*, and that it was so substituted at, or before the year 1695, and that said last mentioned *oak* was a bounded tree of *Bold Venture*, then they must find that it was the beginning tree of said tract.

11th. If the jury believe from the evidence that *Oulton* was under a mistake as to the true location of the patent of *Mountenay's Neck*, and supposed that its beginning tree was at H, and accordingly called for his first line to terminate at a *red oak* at that spot, then said call of itself does not establish that at that time a *red oak* stood as the first boundary of *Mountenay's Neck*, according to its true location.

12th. *That there is evidence from the recitals of the patents offered in this cause*, and from the undisputed locations on the plats, and *the verdict of the jury and certificate of the surveyor*, and the depositions accompanying the same, from which the jury may find that the *red oak*, the original beginning tree of

Mountenay's Neck, was destroyed in 1695, and that a *white oak* at, or before that time, was substituted in its place.

13th. That whether the beginning tree of *Bold Venture* originally stood at M, is a question of fact to be ascertained by the jury, and not a question of law, to be authoritatively decided by the court.

14th. That there is evidence in this cause from which the jury may find that the true beginning of *Bold Venture*, as originally located by *John Oulton*, was at black M, as marked on the plats.

15th. That if the jury find the location of the tract of *Bold Venture*, as made by the defendants, particularly the beginning at A, even with such degrees of allowance for variation of the compass as they may think it right to allow, is not true, but false, then they cannot give their verdict for the defendants in support of such false locations.

16th. If the jury find from the evidence that the location of *Bold Venture* by the defendants is correct, and from the warrant, certificate and patent thereof, that no intimation or statement was given to the Lord Proprietary, that so much of the said tract as they may find, was covered by navigable water, was in fact so covered, and if the jury find that the said *John Oulton* purposely kept back and fraudulently concealed the fact that so much of the said tract was covered by navigable water, and that it was in front of the elder tract binding on or in the water, granted to *Alexander Mountenay*, then the patent to said *Oulton* was void, at least so far as it extended into navigable water.

17th. That it was not competent to the Lord Proprietary to grant to *John Oulton* the soil covered by navigable water, in front of and with the water line of *Mountenay's Neck*, that such grant was in derogation of the patent to *Mountenay*, and void.

18th. That the fifth line of *Bold Venture* should, as defendants have located it, be shortened above, or at the river side near Z, so as to gratify the call of the sixth line of that tract, which is to terminate at the river side, and that so much of the

sixth line as is necessary for the same purpose should be stricken out.

And the defendants prayed the court to direct the jury as follows:

1st. That the location of *Mountenay's Neck* on the plats in the case, not having been counter-located, the jury must find such location of that tract to be the correct one.

2d. If the jury find that the tract of land called *Bold Venture* was granted as given in evidence by the defendants, and that the defendants' location of the *second* and *third* lines of that tract on the plats in the case is the correct location, that then the patent of *Mountenay's Neck* gives no title to the lessors of the plaintiffs to the lot of ground for which the defendants have taken issue on the plats.

3d. That the *second* and *third* lines of the said tract, called *Bold Venture*, if the jury find said tract was granted as given in evidence by the defendants, must run with two lines of the tract of land called *Mountenay's Neck*, as that latter tract is located on the plats, and if the jury find that the said two lines are those on the plats running from black M to black N, and from black N to red figures 320, that then the patent of the tract, *Mountenay's Neck*, gives no title to the lessors of the plaintiffs, to the lot of ground for which the defendants have taken defence on the plats in the case.

But the court, (Archer, C. J., Le Grand, A. J.) granted only the *second* and *ninth* of the plaintiffs' prayers, and rejected the others, and in respect of the prayers of the defendants, gave the same to the jury. To which rejection and direction by the court, the plaintiffs excepted.

The plaintiffs below prosecuted this appeal.

The cause was argued before Dorsey, Chambers, Spence, and Magruder, J.

By Mayer and Dulany for the appellants, and

By W. F. Giles, McMahon and Reverdy Johnson for the appellees.

DORSEY, J., delivered the opinion of this court.

The point in this cause, most strenuously urged and relied on by the plaintiffs, is, that the beginning of the tract of land called *Bold Venture*, cannot be found by reversing the course and distance of its first line from the boundary called for at its termination, as expressed in the patent; because, by such reversal of the line, the beginning thereof is shown to be in deep navigable water, a great distance from the shore, and where the beginning tree called for, as at the commencement of the first line, could not possibly have stood at the date of the grant. As the decision of this question, if in favor of the plaintiffs, would be decisive of the present controversy under a decision of this court upon the appeal from the *first trial* of the case in the County Court, it appropriately, from its importance, is first entitled to our consideration. And to aid in its determination it may not be amiss to lay down some propositions, and make some suggestions in elucidation of the question before us.

If a tract of land call to begin at a bounded tree by the side of the branch, and to run thence course and distance to a known boundary, and the beginning tree be lost, to find the commencement of the first line of the tract you must reverse the course and distance from the known boundary, called for at the end of the first line, and not elongate, nor shorten, the line to the branch; the expression as to the branch being merely descriptive of the general locality of the tree, not an imperative call locating the spot where the tree stood. The words "by the side of a branch," thus used, are no indentification of a particular spot where the tree must have stood. The commencement of the line at any one of ten thousand different spots by the branch side, at great distances from each other, would comply with such a description of the beginning. Instead then of obtaining what is the leading object in the gratification of all calls, certainty in the location of grants of land, by adopting the principle contended for, that the line must be made to terminate at the branch, you establish a rule productive of the greatest uncertainty. If the words "standing by the side of a branch," be regarded as an imperative call fixing the termination of the

line where the boundary is lost, both course and distance may be disregarded to reach it; it controls them both. Suppose neither course nor distance will strike the side of the branch; by whom is the particular spot on the branch side for the termination of the line to be determined? by the court or by the jury? And by what principles of law or fact is the determination to be governed? Suppose there be a point on the branch side which might be reached by the distance, but is wholly inconsistent with the course, in accordance with which the extension of the line to the branch side would expend ten times the number of perches, and include ten times the quantity of land expressed in the patent: which would you gratify, the course, or the distance? The general rule is, that if there be a peremptory call to an object of length by a course and distance line, and the object can be reached by gratifying the distance, but violating the course, or by conforming to the course and disregarding the distance, the course must control the distance; the termination of the line being thereby fixed with greater certainty. As the termination of the line is at the point where the course first strikes the object called for; whereas, there might be various points in the object called for, equidistant from the beginning of the line to be run.

The word "by," when descriptively used in a grant as in the case before us, does not mean "in immediate contact with," but "near" to the object to which it relates. And "near," is a relative term, meaning, when used in land patents, very unequal and different distances.

Suppose the boundary sought to be established, instead of being expressed as standing at the beginning of the first line of the tract of land sought to be located, was described as a boundary standing at the end of the first line, and consequently the beginning of the second line of the survey; and the boundary not being known, by running course and distance the line would terminate in navigable water, as deep, and quite as far from the shore, as the first line of *Bold Venture* reversed, does in the case before us. Would the patentee lose all benefit from his grant by such an occurrence? or would not the

court, in accordance with the dictates of justice, *ut res magis valeat quam pereat*, rather say, we will disregard what is said of the bounded tree as a means of showing the terminus of the first line, and will ascertain it by the course and distance, which by the patent, the line is expressed to run. The reason assigned for running the lines of lands to the boundaries called for at their terminations, instead of terminating them according to their courses and distances, is not exclusively that greater certainty as to the termini of such lines is thereby attained, but also because thus locating their grants is more beneficial to the grantees, and because it is rule of construction in expounding grants, to give them that interpretation which operates most strongly against the grantors, and in favor of the grantees. There is not the shadow of a reason for giving validity and operation to a patent whose second or subsequent boundary being unknown, the expressed course and distance thereto shall terminate in like circumstances to the alleged beginning of *Bold Venture*, that would not apply with equal force to a similar termination of the first line of a tract of land, reversed, to find its first beginning.

A deed or patent for a tract of land passes nothing unless the land described therein is susceptible of location, or in other words, unless the survey thereof can be made to close. And it is perfectly immaterial whether the impediment to location arise from an inability to ascertain the beginning of the first line of the land granted, or the end thereof; or the beginning or end of any other of its lines. In either case, no title to the land is transferred under the deed or patent, unless it be in the rare case of the lines of a tract of land crossing each other, or coming in contact, so as entirely to enclose a separate part of the tract, before the occurrence of the insurmountable obstacle to the enclosure of the entirety.

If a tract of land be granted by boundaries only, without courses and distances, as beginning at A, and running thence a straight line to B, thence to C, thence to D, and so on to the beginning. If the beginning or any subsequent boundary be lost, and its original situs be insusceptible of establishment by proof,

the entire tract of land is lost, and the grant thereby becomes inoperative and void. So, if a tract of land be granted by courses and distances only, without calling for any boundary or object save that described as standing at the commencement of its first line, and that boundary or object be lost and no legitimate proof can be adduced of the beginning or ending of any of its lines, the tract of land, thenceforth, becomes a nonentity: the grant for its conveyance, a nullity. But if a grant be made not only with courses and distances, but with calls for objects or boundaries at the ends of some of its lines, it has a principle of self-sustentation imparted to it, not possessed by either of the two first mentioned grants. And, therefore, if the beginning, and any, or all the boundaries, save one, are lost and incapable of being proved, the vitality of the grant still continues, its legal validity is as fully recognized, as if all its boundaries were still known and in being. And this principle of self-preservation does not owe its existence to any implied construction of the grants resulting from the dictates of justice, public policy, or expediency, but is the natural import of the express words of the grant, which declares not only that the lines are to be run to the specified calls, but that each line is to be run a specified course and distance. *Prima facie* then the terms and expressions of the grant are as fully complied with, by running the tract of land by course and distance, as if it were run in conformity to the calls. In the contemplation of the grant, both modes of running were to lead to the same points; the same results. Where a line of a tract calls for a boundary at its beginning, and a boundary at its end, and one of the boundaries be lost, the beginning or end of the line where it is alleged to have stood, is found with equal facility. And the same mathematical certainty is obtained whether you run the course and distance progressively to the end of the line, or retrogressively—that is reversely—to its beginning. With equal truth and precision, the desired object is accomplished in both modes of proceeding.

But suppose it were conceded that the words "by the side of the branch" create an imperative call, and that the reversed

line must be elongated to reach it, or shortened to stop at it, what benefit would such a construction ultimately confer on the plaintiffs? Unquestionably none. Because then the reversed first line of *Bold Venture*, instead of terminating at red A, would be elongated to *Long Island Point*, at the water line of the north-west branch; and as effectually accomplish the objects of the defendants, as it would do in terminating at the red letter A.

It cannot be denied that a valid survey or grant of a tract of land may be made, without stating any natural object as being at the beginning of its first line, if there be boundary at the termination thereof, for example, the beginning of *Bold Venture*, as described in the patent of *Rogers' Inspection*. Such, indeed, is the true import and condition of the grant of *Bold Venture*, rejecting the statement as to the bounded tree, alleged to stand at its beginning. And it is equally clear, that it forms no objection to the validity of a grant of land, that the place of its beginning is covered with water, whether navigable or otherwise, or that any of its lines run across such water. It is also undeniably established by authority, that if the beginning tree of a tract of land be lost, and the lines thereof have courses and distances, and one of them also a known boundary, that the beginning of the tract may be found by reversing the courses, and expending the number of perches on the anterior lines. But it is alleged by the appellants' counsel, that the beginning of a tract cannot be thus established, where it appears that the lost beginning could not have stood, at the time of the survey, at the point, thus ascertained by the reversed course and distance running. If there be such an exception to the general rule so well established, as to the mode of finding the beginning of tracts of land, whose beginning trees have been lost, it is incumbent upon him to produce the authority by which the exception is sustained. This he has wholly failed to do. And he is equally in default in not having shown, that upon reason, or the analogies of the law, such an exception ought to prevail.

Why is it that a plaintiff in ejectment in any case is unable to recover, by reason of his inability to prove his beginning tree?

It is because, not having proved the beginning of his tract, he has lost all means of making or sustaining his location thereof, and consequently fails in his action. In reference to any other question, the inquiry rarely, if ever, would have been entered into, as to the truth or falsehood, possibility or impossibility, of the statements in the grant relating to the trees, alleged to be standing at the commencement of the first line of the tract. Conceding the whole statement, as to the beginning trees of *Bold Venture* to be false and impossible, what would it avail the plaintiffs below? Nothing. The grant of the land is uncontroverted. By its course and distance lines, and remaining boundary, a location thereof can be established. Land so granted, when the boundaries are all known, is capable of two modes of location. The one by running the lines to the boundaries called for, without regard to the courses and distances; the other is to run the land according to its courses and distances, without reference to its boundaries. Both these modes of running are in perfect consistency with every thing appearing upon the face of the grant. But lest there should be a diversity in the results, thus obtained by different means, and, in order, as is supposed, to give greater certainty to the locations of grants of land, and to give them that operation which shall be most beneficial to grantees, the courts of this State have determined that in all locations of lands the first mentioned mode of running shall, if practicable, be conformed to; but if that be impracticable by reason of an inability, from any cause to prove the boundaries, the land shall be located by running its lines according to their courses and distances. It is no unusual thing for old surveys of land in this State, where boundaries are called for at the end of its lines, to contain an excess in quantity, sometimes twice, three times, or four times, as much land when run by its boundaries, as when located according to its courses and distances. The quantity, in such cases expressed in the patents, being always the same, with that ascertained by a course and distance running. That such discrepancies were the result of mistakes, nobody can believe; nay, it is a matter of history, and of notoriety, that they were

matters of design, and our courts might well say that running lands, (granted by the Lord Proprietary) according to their boundaries and calls, was more beneficial to the grantees than a course and distance running. It would thence follow, as clear as mathematical demonstration can show any thing, that the lines of such surveys, when run course and distance, could not terminate at the points, where stood the boundaries called for as the termini of those lines. And hence, it is apparent, that if a boundary or beginning of such a survey were lost, no course and distance running, whether progressive, or retrogressive, could possibly conduct you to the point, where the lost boundary or beginning originally stood. According then to the doctrine contended for by the appellants as to *Bold Venture*, if in any of the surveys mentioned, a beginning or boundary thereof be lost, the whole tract of land is utterly lost, being incapable of true location, by any running of the course and distance lines, reversely, or progressively. To such a discovery the case before us certainly has given birth. Of it the venerated founders and expounders of the land law of *Maryland*, never appear to have caught a glimpse; or so many thousands, tens of thousands, or perhaps hundreds of thousands of acres of land, would not have been held for perhaps a century in opposition to such a principle by citizens of this State, who never dreamed of a taint or defect in their titles. In finding the beginning where, as is alleged, stood a bounded tree of a tract of land, or the terminus of one of its lines, which calls for a boundary that may have been lost, properly speaking, you do not resort to a course and distance running, either direct, or reverse, for the purpose of finding the spot where the lost tree or boundary in point of fact stood; but to find the beginning or end of the line, as the case may be, where it is stated to have stood. And such running, in contemplation of law, establishes the beginning of the tract or termination of its lines, whether in truth or in fact the beginning tree or bounded tree did stand or could have stood there or not: and this legal conclusion is wholly unaffected by the belief or disbelief of the court or jury upon that subject.

If proof were required to show that course and distance lines are elongated when run from boundary to boundary, it is furnished by the first line of *Mountenay's Neck*, which, by the patent, is expressed to run one hundred perches, but measures one hundred and thirty-three perches, when run from the boundary at M to that at N.

A great variety of other points have been mooted in the argument of this cause, on which it is not deemed necessary to express any opinion, as many of them are settled by this court, in the case of *Casey's lessee vs. Inloes et al.*, reported in 1 *Gill*, 430; and they are not presented for our adjudication by the record before us. It is deemed expedient, therefore, to proceed to the examination of the exceptions separately, and of each of the parties' prayers, as stated in the last bill of exceptions.

In rejecting, (as appears by the *first* bill of exceptions,) the escheat warrant and certificate of *Edward Fell* for *Bold Venture*, when offered as proof that *John Oulton* died intestate, and without heirs, before the year 1745, the County Court committed no error. In *Casey's lessee vs. Inloes et al.*, this court decided, that an escheat grant is *prima facie* evidence that the land granted is liable to escheat at the date of issuing the escheat warrant, and not antecedently; "the court regarding the statement of that fact in the warrant, upon the representation of the grantee, as being so avouched and verified by his payment of the purchase money, and acceptance of the patent, as to entitle it to the character of *prima facie* evidence. But in the case before us, the statement in the warrant was sustained by no such avouchment and verification; on the contrary, the County Court very properly regarded the statement as discredited, if not falsified, by the omission or refusal of the person to whom the warrant issued to consummate his title, and pay the required portion of the value of the land escheated, as evidence of his having discovered that there devolved upon the Lord Proprietary no title by escheat,—and, therefore, rejected the proffered testimony for the purpose for which it was offered.

In rejecting the testimony offered by the plaintiffs in the second bill of exceptions, there is no error; there being at the date of the proceedings offered in evidence, no law authorizing or directing the same, or the recording thereof—the court below could not do otherwise than reject a paper, purporting to be a copy of the record, which, in the eye of the law, was no record at all. The court also rightly rejected the testimony, because it sought to establish the true location of *Bold Venture*, by running it in a way wholly inconsistent with the calls and expressions contained in its patent.

Of the County Court's refusal to grant the first prayer of the plaintiffs, they have no reason to complain. It called for an instruction to the jury, that if they "shall find that the beginning of *Bold Venture* is not truly located on the plats by the defendants; or, if truly located, they shall find that the title to said tract became vested in the State, by escheat, in 1759, then the plaintiffs are entitled to recover." To the first branch of the prayer, the plaintiffs were not entitled; because M, the beginning of *Mountenay's Neck*, being admitted by the locations of both parties—and the patent of *Bold Venture* having declared it to be the end of its first line, the jury were precluded from any finding to the contrary. And the bounded tree called for at the beginning of the first line of *Bold Venture* being lost, it is matter of law, to be pronounced by the court—not a matter of fact, to be found by the jury, that the beginning of the tract of land was to be found by expending the number of perches expressed in the patent, as the length of the first line on the reversed course and distance thereof. In conformity to this principle of law, the beginning of *Bold Venture* had been ascertained and located on the plats by the surveyor; and there was not the shadow of proof, or of suspicion, that such ascertainment had not been correctly made: under such circumstances, to have permitted the jury to pass upon the correctness of such a location of *Bold Venture* would, in effect, have submitted to the finding of the jury the soundness of the principle of law, under which the location had been

made;—or, in other words, it would have authorized the jury to determine a matter of law, not of fact.

In refusing the first alternative of the plaintiffs' prayer, no error is perceived; and the principles settled by this court, in *Casey vs. Inloes*, 1 *Gill*, 430, show that the County Court were clearly right, in refusing the prayer upon its second alternative.

By the act of 1745, ch. 9, the State granted no right which accrued to it, subsequently to the passage of that act of Assembly. An escheat grant, by the State, is no evidence of the existence of the facts constituting the escheat, anterior to the date of the warrant. Of course, if these principles are adhered to, the court below could not do otherwise than refuse to instruct the jury, that an escheat title accruing to the State in 1759, would entitle the plaintiffs to recover under the operation of the act of 1745.

The second and ninth prayers of the plaintiffs having been granted by the court below, they form no subject for revision under the present appeal.

The *third* prayer of the plaintiffs was rightfully rejected by the County Court, for a reason heretofore assigned in support of its rejection of their first prayer. The granting of it would, in fact, have conferred on the jury a discretionary power of finding the principle of law by which the beginning of *Bold Venture* was established, which principle it was the province of the court to declare—not of the jury to find as a matter of fact. And by granting the prayer, the jury might well have understood it to be (as in effect it would have been) an instruction to them, that there could be no true location of *Bold Venture* which did not locate its beginning entirely on the north side, of the northern water line, of the *Patapsco* river—thus giving to expressions in a grant, intended merely as generally descriptive of locality, a conclusive and restrictive import, which is clearly denied to them by the unquestioned decisions of the highest judicial tribunals of *Maryland*. In proof whereof, it is deemed sufficient to refer to the case of *Hammond vs. Ridgely*, 5 *Har. & Johns.* 245.

That the County Court, in refusing the plaintiffs' *fourth* prayer, were right, is sufficiently shown by the positions asserted in the previous part of this opinion.

The court below did not err in refusing to instruct the jury, as required by the *fifth* prayer of the plaintiffs, that the defendants had offered no sufficient evidence of the location of *Bold Venture;* "because they have offered no testimony of any endeavor being made to find the beginning of the tract; and because they have not located *Whetstone Branch*—that being the place on which said beginning is described in the patent to be, and where said beginning tree is sought for." The first reason is insufficient, because the testimony, given by the defendants through the surveyor, in the absence of all impugning proof, relieves them from the obligation supposed to rest upon them; and had no such evidence been given by the surveyor, the plaintiffs, themselves, had offered all the requisite testimony upon the subject, by their location of the escheat grant of *Bold Venture*, called *Rogers' Inspection*, which shows that in 1759, the beginning tree of *Bold Venture* was lost, and could not be found; and that, at that time, the beginning of the tract was ascertained in the same manner, and was located at the same place, that the defendants have done on the plats before us. The second reason is also insufficient, because it was understood as being admitted by the parties in the cause, that *Whetstone Branch* was located. But suppose no such admission was made, or intended to be made, it interposes no objection to the defendants' location of *Bold Venture.* The tree being lost for reasons hereinbefore stated, the spot where it stood is not so indentified by the description in the patent, as to enable the surveyor to locate it with any reasonable degree of certainty. It must, therefore, be rejected, as forming a less certain mode of finding the beginning of the tract of land, than by reversing course and distance from the first known boundary.

The sixth prayer of the plaintiffs is "that the defendants have not truly located *Bold Venture*, if the jury shall find from the testimony, that the line from M to A should have been run with allowance for variation, and has not been run so, and

that they must so find if they believe the testimony of *Mr. Bouldin.*"

It cannot be denied, but that the jury are the proper tribunal to decide whether any, and what, variation ought to be allowed in the location of lands. But whether any, and what, degree of allowance for variation, ought to be made, are questions of fact, to be determined by the jury on the testimony upon that subject, adduced to them in the trial of the cause. If no such testimony be offered, the jury are not authorized to depart from the courses and distances expressed in the conveyances, by making any allowance for variation. In the case under consideration there was a total absence of all testimony in relation to variation, and consequently, the court could not have done otherwise than refuse the sixth prayer of the plaintiffs. But suppose it had been otherwise, and that there had been evidence before the jury which would have warranted them in making an allowance for variation, and that for the court's error in this respect its judgment were reversed, this court would not send it back to the County Court, to be tried anew, because by no allowance for variation, which the jury could rationally have made, could the merits of the present controversy be in any wise affected.

From the views already expressed, it is apparent that the County Court were right in denying to the plaintiffs the instruction prayed for in their seventh prayer: which was "that the defendants have not truly located *Bold Venture*, inasmuch as they cannot run the fifth line of that tract, as they have located it on the plats further than to the river side, as designated on the plats by a black broken line, shaded blue, a little distant from *Z*, and south-westerly thereof." The ground upon which only this instruction could have been claimed, must be that the fifth line of *Bold Venture* calls for a bounded oak as its terminus, which could not have stood in the navigable water where the fifth line is made to terminate, according to the defendants course and distance running thereof. Assuming the truth of the facts, on which the plaintiffs base their prayer, it is evident that upon the views hereinbefore expressed upon the

plaintiffs' first prayer, that the instruction prayed for by the seventh prayer could not have been granted. But the same result is equally manifest upon another ground. The fifth line of *Bold Venture* simply calls for a bounded *ash*, without any reference or call to the river side or water. And there is no location or evidence in the cause to prove that where the said fifth line terminates, as run course and distance by the defendants, is not, and always has been, high and fast land, on the north side of the north-west branch of the *Patapsco* river; or, in other words, of "*Whetstone Branch*," where the bounded ash may well be presumed to have stood.

The County Court's refusal to grant the plaintiffs' eighth prayer is equally sustainable. There is no controversy as to the true location of the tract of land called *Mountenay's Neck*. It is a fact admitted by the pleadings in the cause, and which both parties are estopped from denying, that the beginning tree of *Mountenay's Neck*, is truly located at the letter M; and that the bounded tree called for as standing at the end of the first line of that tract, is truly located at the letter N. The patent of *Bold Venture*, in terms as explicit and positive as language can make them, calls for the bounded red oak, (which is the beginning tree of *Mountenay's Neck*,) as the terminus of its first line, and to run thence, bounding on *Mountenay's* land, the same course and distance as its first, to the bounded white oak (which stands at the end of its first line) of *Mountenay's* land. These two bounded trees are the only boundaries called for in the patent of *Mountenay's Neck*. Looking, then, to the unquestioned boundaries and locations of the first line of *Mountenay's Neck*, and the clear and imperative call for the termination of the first line of *Bold Venture*, it appears most difficult to conceive how a question or doubt could arise as to the place where the first line of *Bold Venture* must terminate. But the patent of *Bold Venture* states its beginning to be at a bounded white oak, standing by the branch side, it being a bounding tree of *Poultney's Point:* and the plaintiffs insist that *Poultney's Point* and *Long Island Point* were one and the same tract of land; and that the only bounded

oak called for by *Long Island Point*, was the oak located at M, the beginning of *Mountenay's Neck*. And they pray the court to instruct the jury, that if they believe these facts, and that the said last mentioned oak was the tree referred to in the patent of *Bold Venture*, as a bounding tree of *Poultney's Point*—then they are bound to find the beginning tree at M. Now, let us concede the truth of all the facts, which the jury are required to believe as the basis of the finding, claimed at their hands by the plaintiffs. What do these facts, when taken in connection with the admission as to the location of the first line and boundaries of *Mountenay's Neck*, and the positive, unequivocal expressions of the patent of *Bold Venture* prove; what the irresistible inference; what the conclusive demonstration? It is that there is an error in the patent of *Bold Venture;* either in the description of the tree alleged to stand at the beginning of the first line of that tract of land, or in the boundary stated to stand at the end of that line. These descriptions are utterly irreconcilable: they cannot both be gratified or stand together; the one or the other must be rejected. It is impossible that both the beginning and end of the first line of *Bold Venture* should be at the same point, at the letter M. Under such circumstances, the court is invoked to declare that M is the beginning of *Bold Venture;* that the peremptory call of the first line of *Bold Venture* to terminate at the boundary at M, is to be, in effect, expunged from the patent. To justify the gratification of such an invocation to the court, not the semblance of an authority has been adduced. There is not a shade of difference between the weight to be ascribed to a call for a boundary, or matter of description thereof, when referred to as the beginning of a tract of land, or as the terminus of one of its lines. Under like circumstances, the obligation to gratify the same is equally imperative in both cases; there is, in this respect, no priority or preference between them. As the ground then, upon which, in the decision of the question raised by this prayer, the opinion of the court below must have been governed, let us enquire what are the probabilities of mistake as to the boundary called

for, or described as standing at the beginning or the end of the first line of *Bold Venture?* What consequences would result from the rejection of the one or the other?

It is most obvious, from an inspection of the patents of *Bold Venture* and *Mountenay's Neck*, that the first line of the former of those tracts calls for the beginning tree of the latter as its terminus; and that the second line of *Bold Venture* was to run with and bind on the first line of *Mountenay's Neck* to its boundary at N; and that the third line of the former tract was to run with and bind on the second line of the latter tract to its termination. And it is a necessary presumption that, in making the survey of *Bold Venture*, on which its patent is founded, those boundaries and lines of *Mountenay's Neck* were known to the surveyor. In his calls for them, therefore, there could have been no mistake; they could have been no other lines and boundaries than they are represented to be in the patent of *Bold Venture*—none others could have been referred to by the surveyor.

But what is the evidence that the surveyor, in describing the beginning tree of *Bold Venture*, referred to, or meant to refer to, the beginning tree of *Mountenay's Neck?* When looking only to the patent of *Bold Venture*, no such reference could possibly be inferred. He describes the tract of land, called *Bold Venture*, as beginning at a bounded white oak, standing by the branch side—it being a bounded tree of *Poultney's Point*. If he had known it to have been a boundary of *Mountenay's Neck*, in all human probability, he would have added to the words *Poultney's Point*, the words "and of *Mountenay's Neck*, or of *Mountenay's Land.*" This omission to do so, is strong evidence that he had no design, belief or knowledge, that he was describing the beginning tree of *Mountenay's Neck* as the beginning tree of *Bold Venture*. The only evidence that he did so, is a call for the beginning of *Mountenay's Neck*, in the fifth line, of *Long Island Point*—the patent or certificate of which, for aught that appears, may never have been seen by the surveyor who executed the warrant under which *Bold Venture* was granted. But let it be con-

ceded that the patent of *Bold Venture* does describe, as its beginning tree, the beginning tree of *Mountenay's Neck*, is it not obvious that such description is founded in mistake or falsehood; and is, therefore, insufficient to overrule and control other calls and expressions in the patent of *Bold Venture*, inconsistent therewith? Assume but the single fact of falsehood or mistake in the description of the beginning tree of *Bold Venture*, as being "a bound tree of *Poultney's Point*," and every other word and expression in the patent may be harmoniously gratified, in perfect consistency with such an assumption. But assume the fact to be as contended for by the plaintiffs, that the beginning of *Bold Venture* is at the letter M, the beginning tree of *Mountenay's Neck*, and see the consequences which would flow from it. You virtually expunge from the patent that clause in it, which directs that the first line of *Bold Venture* shall be run north, north-east fifty-eight perches, and terminate at the beginning tree of *Mountenay's Neck;* and that clause, which calls to run the second line of *Bold Venture* with the first line of *Mountenay's Neck*, to the bounded tree at the letter N; and also that clause, which directs the third line of *Bold Venture* to run with and bind on the second line of *Mountenay's Neck*, three hundred and twenty perches to the end thereof. And although it is apparent from the reading of the patent of *Bold Venture*, that it was intended to bind on and lie wholly clear of *Mountenay's Neck*, you cause a large portion of the former to lie foul of the latter. Under such circumstances, it cannot be a matter of doubt that the court below were right—not only in refusing the plaintiffs' eighth prayer, but would have been justified in giving an instruction to the jury that, according to the true construction of the patent of *Bold Venture*, its beginning could not be at the letter M.

That the tenth and eleventh prayers of the plaintiffs were properly rejected by the County Court, follows from what has been said in relation to their eighth prayer.

The court below were warranted in refusing to grant the plaintiffs' twelfth prayer; because, after the refusal of the court

to grant the eighth prayer, for the reasons hereinbefore stated, there was no matter of fact in issue before the jury, to which the instruction sought could apply, or was material.

And were also warranted in refusing the plaintiffs' thirteenth prayer; because, upon the pleadings and admissions on the plats in the cause, whether the beginning tree of *Bold Venture* originally stood at the letter M, was not a question of fact, but a matter of law, dependent upon the true construction of the patent thereof—as is hereinbefore asserted when examining the eighth: and, it is evident, that it was so regarded by the counsel of the plaintiffs, when he presented the eighth prayer for the court's determination.

The refusal of the County Court to grant the plaintiffs' fourteenth prayer has necessarily been sustained, by what has been said in relation to the eighth and thirteenth prayers.

There is no error in the County Court's refusal to grant the plaintiffs' fifteenth prayer. Whether any, and what allowance for the variation of the magnetic needle, ought to be made when locating ancient surveys with course and distance lines, is undeniably a question of fact, to be determined by the jury, when testimony, legally sufficient to enable them to form an opinion thereon, has been adduced before them. And like all other matters of fact, the finding of the jury must be founded upon the proof in the cause. If there be no proof upon the subject, the jury are bound to find the locations, according to the courses and distances expressed in the grant, and can make no allowance for variation. It would be productive of great injustice and ruinous consequences to land-holders, if juries were authorized to make whatever allowance for variation their crude notions upon the subject might suggest—unaided and uncontrolled by experience, or the lights of science. In the case before us, no testimony whatever had been offered to the jury in relation to it;—and, consequently, a rejection was the inevitable fate of the fifteenth prayer of the plaintiffs.

The court below correctly refused to grant the plaintiffs' sixteenth prayer, viz: "That if the jury find from the evidence, that the location of *Bold Venture* by the defendants is

correct, and from the warrant, certificate and patent thereof, that no intimation or statement was given to the Lord Proprietary that so much of the said tract, as they may find was covered by navigable water, was in fact so covered; and if the jury find that the said *John Oulton* purposely kept back, and fraudulently concealed the fact that so much of the said tract was covered by navigable water, and that it was in front of the elder tract, binding on or in the water, granted to *Alexander Mountenay*—then the patent to said *Oulton* was void, at least so far as it extended into navigable water. On whom the alleged fraud was perpetrated, or designed to be perpetrated, the prayer does not assert, but leaves that question as a subject of amusing speculation and investigation for the court. From the first part of the prayers making it an indispensable ingredient to the fraud—the failure to communicate to the Lord Proprietary the condition of the land granted, as regards navigable water—it might be inferred that the alleged fraud was supposed to have been committed upon the rights and interests of the Lord Proprietary;—because, if it were a fraud upon the proprietor of *Mountenay's Neck*, or of the community at large, the communication to the Lord Proprietary could not purge the grant of its fraudulent impurity; its only effect could be to render him a *particeps criminis*. But the grant of *Bold Venture* did not perpetrate the semblance of a fraud upon any body. The only rights which the proprietor of *Mountenay's Neck* or the public had, in that which was granted by the patent of *Bold Venture*, are those of piscary and navigation, which remain unimpaired, and as perfect after the grant as they were before. If by the grant a fraud were practised upon the Lord Proprietary, he only, or those subsequently claiming under him, have a right to complain; it lies not in the mouth of the present plaintiffs to set up such a defence. It surely cannot be contended that a fair, *bona fide*, valid grant of 1695 is rendered fraudulent and void by the passage of the act of 1745, ch. 9; and so far from any fraud being perpetrated upon the Lord Proprietary by the grant of *Bold Venture* at the time it was made, it conferred upon him an essential bene-

fit, by giving to him the full price of valuable land, for that which, at the time, was of little or no value.

There is quite as little ground for the plaintiffs' complaint, that the County Court refused to give their seventeenth prayer. The Lord Proprietary had an indubitable right to make the grant of *Bold Venture* as he did. The rights of navigation and fishing being fully preserved, no existing just right of the grantee of *Mountenay's Neck* was lessened or destroyed thereby; and thereof, therefore, the proprietor of *Mountenay's Neck* had no right to complain.

The refusal of the County Court to give the instruction sought by the eighteenth prayer, is entirely approved of. The first objection to the prayer is, that the expediency or necessity for granting it is not sufficiently shown; *non constat*, but that, by continuing the location of the water line of the north-west branch, with its sinuosities, beyond the letter *Z*, the sixth line of *Bold Venture* running its course and distance, might terminate at the river side, according to its calls; or that it might be made to do so, by elongating or shortening the same. But there is another objection to the instruction, which should have caused its rejection by the court. It introduces a novel and extraordinary principle in the ejectment law of *Maryland*, which might lead to endless confusion, uncertainty, and litigation, as to the locations of lands. If to produce accordance between a line and its call, you can change the running of the next preceding line, you may, upon the same principle, change the running of every antecedent line of the tract; and such changes will be in direct conflict with the express terms of the grant, and without any settled rule of law to govern them; but according to the notions of each person interested as to the best or most expedient changes, by which the accordance, he desires, may be effected. Such an innovation upon the sound, safe, principles of the ejectment law of *Maryland* has never received the sanction of this court; nor, it is believed, of any of the judicial tribunals of this State;—nor is it hazarding too much to say, that it is confidently expected that it never will.

In granting the three prayers made by the defendants, the court below merely carried out some of the undeniable rules of our ejectment law, and sustained the principles decided by this court in the case of *Casey's lessee vs. Inloes et al.*

Concurring in the propriety of all that has been done by the County Court in its last trial of this cause, its judgment should be affirmed.

JUDGMENT AFFIRMED.

NICHOLAS SHILLING AND OTHERS *vs.* JOSIAH SHILLING.—*December*, 1847.

In 1841, *S.* made his will, and devised an estate for life to his wife, from the crops to be raised on the farm on which he then resided. To his son *N.* he devised a tract of land, on which the son resided. To his son *J.* he devised all the rest and residuary part of the tract or tracts of land of which the testator was in possession, and on which he then (now) resided, and every thing (personal,) wheresoever found upon the premises, intended to be devised; *provided* that he, *J.*, should grant unto the testator's widow an ample and comfortable support during her life. To his son *N.* he gave an estate in trust for his daughter *R.* In 1844, the testator conveyed his whole estate in trust to pay debts, and afterwards, to pay over to him all monies which remained in the hands of the trustee, or to reconvey to the testator all such portions of real and personal property as might *remain unsold.* The trustee sold the whole estate under the deed, and paid the surplus in money, which in fact was the proceeds of the personalty, to the executor of the testator. *Held*, the executor, after payment of debts, &c. was bound to pay the balance in his hands to the son *J.*,—and that the deed of trust was not a revocation of the will in reference to *J's* interest in the surplus.

APPEAL from the ORPHANS Court of *Carroll* County.

On the 19th July, 1847, *Nicholas Shilling* and others filed their petition, representing that they are the children of *Murray Shilling*, deceased; and that they and others, and *Josiah Shilling* are all the children and heirs-at-law of said *M. S.*; that the said *M. S.*, in his life-time, to wit—on the 19*th March*, 1841, made and executed a last will and testament; that the said *M. S.* died about the 22d May, 1846; that on

the 10th April, 1844, the said *M. S.* executed a deed of trust to *W. P. M.*; that after the execution of said deed, the trustee therein named, at the instance and by the direction of said *M. S.*, sold and disposed of, for the purposes in said deed mentioned, all the property in said last will and testament mentioned, and thereby devised to your petitioner, *Nicholas*, and to the use of your petitioner, *Ruth*; and that at the time of the death of said *M. S.*, there was none of the property in said last will mentioned remaining unsold, for the purpose of paying the *debts of said Murray Shilling*, except a part of said property in said will mentioned, which was thereby devised to said *Josiah Shilling*; that all the real and personal estate in said deed of trust mentioned, and which was all the real and personal estate of said *Murray Shilling*, was sold by the said trustee; and that the proceeds thereof, after the payment of the debts of said *Murray Shilling*, according to the provisions of said deed of trust, have been paid over by said trustee to *Nicholas Shilling*, one of your petitioners, to whom letters testamentary on the estate of the said *Murray Shilling* have been heretofore granted, the said *Josiah Shilling*, who was also appointed by said last will one of the executors, having renounced; that your petitioner, *N. S.*, is now ready and desirous to distribute the funds in his hands, as executor as aforesaid, under the order and direction of your Honors: and they state that they are advised, and therefore submit to your Honors, that the facts and circumstances aforementioned, are sufficient to avoid and annul, and amount in law to a revocation of said last will and testament of said *M. S.* and indicate an intention by the said *M. S.* to revoke said last will,—and that therefore all the heirs-at-law of said *M. S.* are entitled to an equal distribution of the funds now in the hands of said executor.

Your petitioners further shew, that the said *Josiah Shilling* claims and pretends that he is entitled, by virtue of said last will and testament, to the whole of the said proceeds now remaining in the hands of said executor—although, as your petitioners have before stated, the whole of the said property devised by the said last will and testament to your petitioners, had

been sold by the direction of said *Murray Shilling* in his life-time, and applied to the payment of his debts, and the proceeds of the residue now being in the hands of said executor, are the whole in value of the estate left by said *Murray Shilling* at his death.

Prayer, to order and direct that the said monies now in the hands of said executor, may be distributed equally amongst all the heirs-at-law of said *M. S.*, &c.

The will of *Murray Shilling* devised as follows:

Item. To my wife, *Rebecca Shilling*, I give and bequeath, during *her natural life and widowhood*, a full and ample support, out of and from the products of crops raised upon the farm on which I now live, and which I have devised to my son, *Josiah Shilling;* and that the said farm be her residence, with her son, *Josiah Shilling*, the same as it now is in my life-time.

Item. To my son, *Nicholas Shilling*, I give and bequeath all of that tract, piece, or parcel of land on which the said *Nicholas Shilling* now resides.

Item. In consideration of my son, *Josiah Shilling*, having resided with and labored for me since he has arrived at the age of manhood, without receiving a full compensation therefor, *I give and bequeath to him all of the rest and residuary part of the tract or tracts of land which I am in possession of, and upon which I now reside.* Also, I give and bequeath to him my negro boy, *Richard*, a slave for life, my household goods and kitchen furniture, farming utensils, of every description and kind, and all and every the stock upon the farm, consisting of horses, cows, sheep, hogs, *and every other thing or things of whatsoever consisting, or wheresoever found upon the premises, hereby intended to be conveyed;* provided always, that my son, *Josiah Shilling*, do grant unto my beloved wife an ample and comfortable support, during her natural life and widowhood—she having the right to reside with him upon said farm.

Item. I give and bequeath to *Nicholas Shilling*, in trust, for the sole benefit and use of my daughter, *Ruth Yingling*, and her heirs, without the control of her husband, *Benjamin Yingling*, one house and lot of land, containing about twelve

acres of land, situate on the *Deer Park* road. Also, a lot of land, near to *Westminster*. &c. &c.

Item.—Lastly. I constitute and appoint my two sons, *Nicholas Shilling* and *Josiah Shilling*, executors of this, my last will and testament.

The deed of trust to *William P. Maulsby* from *M. S.*, made the 10th April, 1844, recited:

Whereas, the said *M. S.* is largely indebted to several persons, and many judgments have been rendered against him in *Carroll* County Court, for sundry of said debts and otherwise, and whereas, for the purpose of securing the payment of all said judgments, and the other debts due and owing by said *M. S.*, he is willing to execute these presents. And the said *W. P. M.* hath agreed to accept the trust hereinafter declared and created.

Now this indenture witnesseth, that for, &c., he, the said *Murray Shilling*, hath given, &c. the said *W. P. M.* and his heirs, all the hereinafter mentioned real estate and personal property, to wit: all that tract, or parts of tracts, or parcels of land, lying and being in *Carroll* County, in said State, composing the farm on which the said *M. S.* now resides, &c.; and also, one other parcel of land, lying and being in said county, on the *Deer Park* road; *and also all the other real estate of him, the said Murray Shilling, of every kind and description, wherever the same may be situate;* and also all the personal property, of every kind and description, of him, the said *Murray Shilling*,—to have, &c. in trust, that the said *W. P. M.* and *his heirs, may sell all the said real estate and personal property*, either at public, or private sale, for cash, or on credit, as he may deem best,—and the proceeds of said sales to apply first to pay and satisfy all judgments at this time obtained against the said *Murray Shilling*, principal, interest, and costs of suit, with power and authority to contest such as are not fair, just, legal or equitable, after having first paid all costs and expenses attending the execution of the trust hereby credited; and after retaining for himself, the said *William P. Maulsby*, a compensation for his trouble in executing this trust; and secondly, to

pay and satisfy all just and fair debts due and owing by him, the said *Murray Shilling*, with power to contest such as are not fair, just, legal or equitable; and lastly, to pay over to the said *Murray Shilling*, or to his executors, or administrators, all monies which may remain in the hands of him, the said *William P. Maulsby*, after paying and satisfying the judgments, expenses and debts aforesaid; or to reconvey to the said *Murray Shilling*, or to his heirs, executors, or administrators, all such portions of said real estate or personal property, as may remain unsold for the purposes aforesaid.

The cause was submitted to the Orphans Court on the following statement of facts.

"*Murray Shilling* executed the paper filed with the petition, as and for a last will, on the day it bears date, which paper was duly admitted to probate in this court. Said *S.* also executed the paper filed with said petition, the same being a deed of trust to *Wm. P. Maulsby*, on the day it bears date. During the life-time of *S.* the trustee, at the instance and request of said *S.* sold all the property which was by said last will and testament devised to *N. S.* and in trust for *R. Y.* and applied the proceeds to the payment of the debts of said *Shilling*, so far as the same went. After the death of said *Shilling*, the said trustee sold the balance of the property conveyed by said deed and applied the proceeds to the payment of the remaining debts of said *Shilling*, which were owing by him at the date of said deed, and after the payment of said debts, there remained in the hands of said trustee, a balance of money arising from said sales which he paid over to *Nicholas Shilling*, to whom letters testamentary on the estate of said *Murray Shilling* had been granted by this court. The amount so paid by said trustee to said *Nicholas Shilling* constitutes the whole amount of estate of said *Murray Shilling*, which said *Nicholas* has in his hands. The said *Murray Shilling* died on the 24th May, 1846. It is agreed that the paper marked C, containing a statement of the testimony, which is not deemed material, of several witnesses, and the admission of the deed to *Nicholas Shilling* may be considered as containing the tes-

timony of those persons—the said facts being deemed material by the counsel of *Josiah Shilling.*

It is contended by the petitioners, that the amount now in the hands of said *N. S.*, as executor, ought to be distributed amongst all the heirs-at-law of said *Murray Shilling*—the widow of said *S.* being entitled to an allowance for her dower in the proceeds of sale of the personal property. The said *J. S.* contends that he is entitled to the whole amount, deducting that to which the widow is entitled—she having renounced said will, in the hands of said executor, by virtue of said last will and testament. It is, therefore, submitted to the court, whether the facts and circumstances contained in this statement and the said exhibit therein referred to, amount *to a revocation of said will?* or whether the said *Josiah* is entitled to the whole proceeds of said estate, by virtue of said will. If the court shall be of opinion that the said *Josiah* is entitled to the whole amount of said estate by virtue of said will, then it is agreed that it shall be decreed and ordered, that the balance which shall remain in the hands of said executor after the settlement of his final account, and after deducting such allowance as the court shall make to the widow, shall be paid by said executor to said *Josiah Shilling.* But if the court shall be of opinion that the facts and circumstances aforesaid amount to a revocation of said will, then the said amount in the hands of said executor, shall be distributed amongst all the heirs-at-law of said *Murray Shilling*, after deducting the allowance to the widow as aforesaid.

At August term, 1847, the Orphans Court decreed that *Nicholas Shilling*, the executor of *Murray Shilling*, deceased, proceed to make a final settlement in this court of the estate of said *Murray Shilling*, deceased; and after the payment of all just debts and expenses, to be allowed to him by this court for the settlement of said estate, and such sum as the court shall allow to the widow of said *Murray Shilling* as her right of dower, the said *Nicholas Shilling*, as the executor aforesaid, shall pay to *Josiah Shilling* the balance of said money in his hands, and that may hereafter come to his hands, as such

exec[illegible], as the proceeds of the sale of the property devised and bequeathed to the said *Josiah Shilling* by the last will of said *Murray Shilling*. And it is further ordered and adjudged, that the said *Nicholas Shilling*, as the executor aforesaid, bring into this court all the monies in his hands, as executor aforesaid, to be distributed and disposed of under the order and direction of the court, to the parties entitled under this decree to the same. And it is further ordered and adjudged, that the petitioners in this case pay the costs of this proceeding, to be taxed by the Register of Wills of this court.

From this decree *Nicholas Shilling* and others, petitioners, appealed to this court.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By McLEAN for the appellants, and

By J. N. STEELE for the appellee.

By the court: DECREE AFFIRMED.

JEREMIAH T. LOOCKERMAN AND OTHERS *vs.* LYDE G. McBLAIR AND OTHERS.—*December*, 1847.

Under a devise "to my dear grand-children of my lots on *W. Point*, to them, and their heirs forever, to be equally divided among them." Grand-children born after the death of the testator do not take any thing.

In this case the devise is immediate: those entitled to the devised premises became so entitled as soon as the testator died. The description of the persons to take, is general; and only those who can take at the time of the testator's death, came within the description.

This devise comprehended all persons answering the description at the time of testator's death.

APPEAL from the Court of Chancery.

The bill in this cause was filed by the appellants on the 2d May, 1845, and represented that the late *Jeremiah Townley Chase* was, in his life-time, seized of sundry lots on *Whetstone*

Point, in the City of Baltimore, and being so seized at the time of his death, by his last will and testament, so executed as to pass real estate, devised the same to his *grand-children*, and departed this life; *that at the time of his death*, there were living the following grand-children, &c.; *that after the death of the said testator*, there were born the following children of his son, *R. M. C.*, viz: *Thomas, Sally, and Richard Chase*, who set up some claim under said will as grand-children, and as such, having a right to participate in said estate. The bill then proceeded to set forth the various interests and assignments of the devisees of the said *J. T. C.* under his will—alleged the estate could not be divided without loss to all the parties; that their interest could only be separated by a sale, which was prayed. Many of the parties were infants. After the answers were filed, and proof taken of the will of *J. T. C.*, dated 26th December, 1823, which contains, among others, the clause following, viz:

"I will, devise and give to my dear grand-children, my lots on *Whetstone Point*, Nos. 10, 11, 12, to them, and their heirs forever, to be equally divided among them."

On the 17th November, 1845, the Chancellor (BLAND) decreed that the real estate in the proceedings mentioned, be sold for partition, &c.

The trustee reported a sale, which was confirmed, when the cause was referred to the auditor for a distribution of the proceeds.

The auditor reported two accounts, in one of which he made no allowance to *Thomas, Sally, and R. M. Chase, Jr.*, grand-children, born after the death of the testator, *J. T. C.*, while in the other account, he placed those grand-children upon the footing of the others.

The Chancellor ratified the latter account; and the other grand-children appealed therefrom.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By McLean for the appellants, and

By Randall for the appellees.

Magruder, J., delivered the opinion of this court.

The late *Jeremiah T. Chase*, died in the year 1828. He made a will dated in 1824, to which several codicils were added. One of the devises is in these words: "I will, devise and give to my dear grand-children, my lots on *Whetstone Point*, Nos. 10, 11 and 12, to them, and their heirs forever, to be equally divided among them."

At the time of executing the will, the testator had several grand-children in being. Others were born after the will was executed, but before his death; and the son of the testator had three children born after the death of the latter; the eldest of them was born in 1830.

An application having been made in behalf of the last three grand-children to be considered among the devisees, (each entitled to an equal interest in the devised premises with each of the older children) the Chancellor so decided, and the single question now to be determined is, whether those three children born since the death of *Mr. Chase*, have, in the premises devised to his grand-children, the interest which the Chancellor has allowed to them.

If the property is not to vest immediately after the death of the testator, but the vesting of it in possession is postponed, then such grand-children as are born before the property does vest in possession, may take. In this case, however, the devise is immediate. Those who are entitled to the devised premises became entitled to the land, so soon as the testator died—the description of the persons to take is general, and only those, who at the time of the testator's death came within that description can take.

In 3 *Bro. Chan. Cases*, 404, note A, to *Andrews* and *Partington*, it is said that the testator's intent must prevail. This is not always the case. *Lord Eldon*, in *Walker vs. Shore*, 15 *Vez.* 125, said, "the construction I am obliged to make in this cause, may break in upon the actual intent of the testator:

this rule, we are told by the master of the rolls, 11 *Vez.* 238, is a rule of necessity, and as soon as any became entitled to a vested interest in possession, after-born children," (of course, grand-children,) are excluded.

But we discover nothing in this clause of the will, nor in all the clauses of the will taken together, from which can be inferred a manifest intent that all the children of his children, no matter when born, should have a portion of the estate devised.

The will itself, (if we knew nothing of the testator,) furnishes abundant evidence that it was written by a man able to express whatever was his intention. If indeed a doubt could exist in regard to the intent here, the question to which it might give rise could only be made by a different class of these claimants. Those born at the time of the execution of the will, might, with some reason, insist that the intent could not be to give to any who might be born afterwards, an interest in the devise, and might refer to the expression, "my dear grand-children," as not used in reference to children, who possibly may—but possibly may not—ever be in *esse*, and certainly not to those of whose existence, of course, he would not have any knowledge. This is the case, however, of a general devise to grand-children, as a class, and in such a case the authorities collected in the note to which reference has already been given in 3 *Brown*, show the devise "comprehends all persons answering the description at the time of the testator's death."

A decree will be signed reversing the Chancellor's order, and in conformity to this opinion.

The costs in chancery and in this court to be a charge upon the fund.

DECREE REVERSED.

JAMES T. SULLIVAN *vs.* ROBERT G. VIOLETT AND JAMES DEMPSEY, PARTNERS, TRADING UNDER THE FIRM OF VIOLETT & DEMPSEY.—*December Term*, 1847.

V. & D. sued *S.*, and declared against him as maker of a note, and upon the common counts. The note was signed by *N. & M.*, payable to the plaintiffs, or order, and across the back of it, *S.* had written his signature in blank. The plaintiffs proved that the signature, *N. & M.*, was written by *S.*, and that he was a partner of that firm. The note was given for a balance due by *N. & M.* to the plaintiffs, upon their request, who had asked for the note endorsed by *S.* The defendant proved that he was not the partner of *N. & M.*, but their agent, and the plaintiffs knew it. The plaintiffs prayed the County Court to instruct the jury, that if they believe that the name of *S.* was written by him on the back of the note at the time it was signed by *N. & M.*, or shortly afterwards—that then the defendant, even if he were not a member of the firm of *N. & M.* is liable in this action, and the plaintiffs entitled to recover, which was granted, and affirmed upon appeal.

The defendant *S.* then prayed for an instruction, that if the jury should believe that the plaintiffs solicited the note from *N. & M.*, to be endorsed by *S.*, and that he was authorized by *N. & M.* to sign their names to such note, and after writing his own name on the back of said note, to send the same to the plaintiffs; and that *S.* did sign the name of *N. & M.* to said note, and wrote his name on the back of the same as endorser, as requested by the plaintiffs,—that then the jury cannot find for the plaintiffs, as the defendant's liability is not that of a maker of said note. The County Court refused said prayer, which was affirmed upon appeal.

Upon the back of the note of *N. & M.*, payable to *V. & D.* or order, *S.* wrote his name generally. *Held*, that he was liable to *V. & D.* as maker.

APPEAL from *Harford* County Court.

This was an action of *assumpsit*, brought on 26th March, 1844, by the appellees against the appellant. The plaintiffs counted upon the promissory note of the appellant, dated 28th January, 1841, as payable on the 1st June, 1841, to the appellees, and also upon the money counts. The defendant pleaded *non-assumpsit and actio non infra tres annos*, on which pleas issues were joined. The verdict was for the appellees.

The plaintiffs, to support the issue on their part, read in evidence to the jury two commissions, and the proofs taken thereunder.

M. Snyder, Jr. proved that in the spring of the year, (during the fishing of 1840,) when *Dutton* and *Myers* were fishing just below the late residence of *Major Green*, and adjoining the fishery then occupied by me, *Myers* encroached on me by running or hauling his seine in my berth, and thus essentially interfering with my rights, I protested against his trespassing on me, and finding him obstinately persisting in his course, so injurious to my rights, I had a vessel anchored on the border of my fishery, to prevent a recurrence of the interference above-mentioned. The fisheries occupied by *Dutton & Myers*, and myself, were immediately contiguous—theirs being the next below that occupied by me. By the means thus described, *Myers* was prevented from further encroachments, and his progress in his fishing was partially suspended, when he found me determined not to permit him to fish in my berth. During these difficulties, a man came to me, and said his name was *Sullivan*,—and also declared that he was one of the partners engaged in the fishery above-mentioned, with *Dutton & Myers*, and that he came to endeavor to produce a reconciliation between his partner, *Myers*, and myself, which he hoped might be done without further trouble. I answered him by declaring my readiness to do in the premises whatever any two disinterested fishermen might decide to be right. I am not positive that *Sullivan*, who spoke to me, as above stated, was *James T. Sullivan*, but I know he walked a little lame, stepping rather on the toes of one of his feet, as if his heel did not touch the ground, and I understood then that he was *James T. Sullivan*. In his conversation with me, the said *S.* intimated that he was the only responsible partner of the above firm of *Dutton & Myers*. He gave me fully to understand, that if the said firm should sustain any loss, he, *S.*, must bear the burden; that he knew nothing about any contract, written or oral, between the said parties.

F. X. Masterton proved that he knew from general reputation and intercourse, that *George H. Dutton* and *Alexander Myers* were members of the firm of *Dutton & Myers;* and in the spring of 1840, *Mr. James T. Sullivan*, the defendant, in-

formed him that he was a member of said firm, which was then engaged in the business of fishing on the *Potomac* river.

The plaintiffs gave in evidence to the jury, that the note drawn by *Myers & Dutton* in favor of the plaintiffs, viz:

"*Havre de Grace, Jan'y 28th*, 1841.

"Note, $490. On the 1st day of June, we promise to pay *Violett & Dempsey*, or order, $490, for value received.

"DUTTON & MYERS."

Across the back of which said note, was thus written, to wit: "*Jas. T. Sullivan*"—in the hand-writing of the defendant,—and *that the signature to said note is also in the hand-writing of defendant.*

The plaintiffs further offered in evidence the following letter from *Dutton & Myers* to plaintiffs:

"*Gentlemen*,—Above we send you our note, payable on 1st June next, for the balance due you, as per your account rendered. We have made the note payable on the 1st of June, as before that time we will be unable to get money here, and we hope that will be satisfactory to you. We have delayed sending the note, hoping that we would have been able to send you some money—but have been disappointed. Should you have an opportunity of disposing of our seine and ropes, you will confer a favor by letting us know.

"Very respectfully, yours,

"DUTTON & MYERS."

"MESSRS. VIOLETT & DEMPSEY, *Alexandria*."

And proved that the body of said letter, as well as the signature to and direction of the same, were in the handwriting of the defendant.

The defendant then read in evidence the following letter from the plaintiffs to *Myers & Dutton:*

Alexandria, December 26d, 1840.

"MESSRS. DUTTON & MYERS, *Gentlemen:*

"Annexed you will find a statement of our account against you for the rent of *Wright's Point Fishery*, showing a balance

due us, without interest, of $490, for which we will be glad to receive your note, payable the 1st May next, *endorsed by Mr. Sullivan*, or send us your draft on some merchant in *Baltimore*, accepted, payable as above-mentioned. We have credited you with the vats, at $35 per pair—the price we were to allow for them when bedded on the landing and caulked, (as you will find by referring to *R. G. Violett's* letter to you, written last winter;) but the vats are not all there; nor are those you have put up of such quality as we had been led to believe we were to receive." "*Mr. Wareham's* note we will hold until due, and hope to find it met promptly. Should we hear of an opportunity to dispose of your outfit, it will give us pleasure to do all we can to aid you in effecting a sale, but fear there is but little probability of such good luck befalling us. There are two outfits on the *Potomac*, to be sold in the course of this winter, and very much doubt whether there can be found as many purchasers to take them.

"VIOLETT & DEMPSEY."

Alexandria, Dec'r 12th, 1840.

Dutton & Myers To *Violett & Dempsey*, DR.

For 1 year's rent of *Wright's Point Fishery*, due as per article of lease, June 1st, 1840, . . .			$900 00
CR.—1840, December 12th. By 6 pair of vats, put up by them on the premises, as per agreement, at $35 per pair, . .	$210 00		
" " *George Wareham's* note, dated 22d Nov. 1840, and payable to them on the 1st June next, and by them endorsed, for .	200 00		
			410 00
Balance due *V. & D.*, . . .			$490 00

Which was admitted to be in the hand-writing of the plaintiffs. And the following lease, which is in the words and of the tenor following, to wit:

Lease. "These articles of agreement of lease, made and entered into this 4th November, 1839, between *Robert G. Violett* and *James Dempsey*, of, &c., and *George H. Dutton* and *Alexander K. Myers*, of, &c.,—witness that the said *V. & D.* have leased, and do hereby lease, to the said *D. & M.* the fishing landing and shore, called, &c."

And then offered evidence by *G. H. D.* that defendant never was a partner in the said firm of *Dutton & Myers; that plaintiffs knew such to be the fact;* that defendant, who resided in *Havre de Grace*, afterwards became *the agent of said firm*, and as such in the absence of said *Dutton* from *Havre de Grace*, and the inability of said *Myers* to attend to business, acted under the direction of said *Dutton* as agent, and so wrote the said letter offered in evidence by plaintiffs and the note on which this suit was instituted, and in compliance with the request contained in said letter of plaintiffs to *Dutton & Myers;* and further proved by *Samuel E. Treadwell*, that he was present at the conversation referred to in the testimony taken under and returned with the said commission to *Alexandria*, as having taken place between the *defendant* and the witness, *Matthias Snyder;* and that said defendant then stated to said *Snyder*, that he was not a partner, and had no interest in said firm of *Dutton & Myers.*

The plaintiffs prayed the court to instruct the jury:

That if they believe from the evidence that the name of *James T. Sullivan*, the defendant, was written by him upon the back of the note offered in evidence at the time said note was signed by *Dutton & Myers*, or shortly afterwards, that then said defendant, even if he were not a member of the firm of *Dutton & Myers*, "is liable in this action, and the plaintiffs are entitled to recover," which prayer was granted by the court.

The defendant then prayed the court upon the evidence above stated to grant the following prayer:

"If the jury shall believe that the plaintiffs addressed the letter of the 23d December, 1840, offered in evidence in this cause to *Dutton & Myers*, requesting their note endorsed by the defendant, and that the defendant was authorized by

Dutton & Myers to sign their names to the note upon which this suit was brought, and after writing his own name on the back thereof, to send the same to plaintiffs, and that defendant did sign the name of *Dutton & Myers* to said note and write his own name on the back of the same, as endorser, as requested by the plaintiffs in said letter, that then they cannot find for the plaintiffs, as the liability of defendant is not that of a maker of said note—which the court (ARCHER, C. J., and PURVIANCE, A. J.,) refused.

The defendant excepted, and prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By H. W. ARCHER for appellant.

This was an action of *assumpsit*, brought to May term, 1844, by *Violett & Dempsey* against *James T. Sullivan*, the appellant, upon a promissory note, drawn in the following words:

"*Havre de Grace, January 28th*, 1841.

"On the 1st day of June, we promise to pay *Violett & Dempsey*, or order, $490, for value received.

"Signed, DUTTON & MYERS."

And endorsed in blank by *James T. Sullivan* at the time it was drawn.

The declaration charged *Sullivan* as maker of the note, with counts for work and labor, goods sold and delivered, and the common money counts. The circumstances attending the transaction, as proved at the trial, were these:

Violett & Dempsey having a claim against *Dutton & Myers*, on the 23d December, 1840, wrote to them as follows:

"*Gentlemen*,—Annexed you will find a statement of our account against you for the rent of *Wright's Point Fishery*, shewing a balance due us, without interest, of $490, for which we will be glad to receive your note, payable the 1st day of May next, or send us your draft on some merchant in *Baltimore*, accepted, payable as above-mentioned."

On the 28th January, 1841, *Dutton & Myers* sent to plaintiffs the note on which this suit was instituted,—and at the same time wrote to them as follows:

"*Gentlemen*,—Above we send you our note, payable on the 1st of June next, for the balance of your account rendered. We have made the note payable the 1st of June, as before that time we will be unable to get money here. We have delayed sending the note, hoping that we would be able to send you some money, but have been disappointed."

And evidence was offered to prove that the above letter and note were written and sent to plaintiffs by *Sullivan*, acting as agent for *Dutton & Myers*. No proof was offered of demand on *D. & M.*, or of notice of non-payment of the note by them.

The above stated facts being in evidence, the defendant prayed the court to instruct the jury—that *Sullivan* could only be treated as an *endorser* of a negotiable note, and as such could only be held liable, upon proof of demand on the maker, and due notice of non-payment; that the form of the note, and the position of defendant's name on it, indicate the intention to become responsible only as second endorser, endorsing for the accommodation of the plaintiffs. This is the legal inference: in this view full effect is given to defendant's signature,—and there is no fact in the case from which the court could infer that he ever assumed to become liable to plaintiffs. *Clopper vs. Union Bank*, 7 *H. & J.* 102. *Farmers' Bank vs. Duvall*, 7 *G. & J.* 88. *Seabury vs. Hungerford*, 2 *Hill N. Y. R.* 80. *Hall vs. Newcomb*, 3 *Hill N. Y. R.* 233. *Story on Promissory Notes*, (*2d edition*,) *sections* 133, 134, 479 *and* 480. *Hough vs. Grey*, 19 *Wend. R.* 202.

2d. That if parol evidence be admissible to rebut the legal presumption, that *S.* could only be held liable as endorser upon the note, and to charge him as maker or guarantor; or even if it should be held, that the fact, that he, not being the payee, endorsed the note at the time it was made, constituted him *prima facie*, a joint promissor with *Dutton & Myers*. The correspondence between the parties, and the fact that he was not privy to

the original consideration for which the note was given, should have been submitted to the jury, to find the intention of the parties. *Story on Promissory Notes, sec.* 479. *Herrick vs. Carman*, 12 *J. R.* 161. *Tillman vs. Wheeler*, 17 *J. R.* 326. *Tenney vs. Prince*, 4 *Pick. R.* 385. *Knapp vs. Parker*, 6 *Vermont R.* 642. *Flint vs. Day*, 9 *Vermont R.* 347. *Nash vs. Skinner*, 12 *Vermont R.* 227.

3d. That even if *Sullivan* be considered a promissor upon the note, the correspondence between the parties furnishes evidence to shew that the note was given for a pre-existing debt, due by *Dutton & Myers* to the plaintiffs,—and therefore void under the statute of frauds. This evidence should have been submitted to the jury, but was excluded by the prayer granted by the court. *Wyman vs. Grey*, 7 *H. & J.* 409, 414. *Rogers vs. Walters*, 2 *G. & J.* 64. *Elder vs. Warfield*, 7 *H. & J.* 391. *Elliott vs. Giese*, 7 *H. & J.* 457. *Aldridge vs. Turner*, 1 *G. & J.* 427.

By Coleman Yellott for the appellees.

1. Some effect must be given to the signature of *Sullivan*, *ut res magis valeat quam pereat.*

2. He is not an *endorser* of the note. *Story on Prom. Notes, sections* 3, 4, 6, 135. *Stat.* 3 and 4 *Anne, ch.* 9. The note could not have been negotiated without the further endorsement of *Violett & Dempsey.* They would thus be compelled to incur a liability against their will. In case of non-payment of the note, *Sullivan*, as *second* endorser, could have sued them as *prior* endorsers. This would defeat their object in seeking *Sullivan's* signature. They could thus become security to him, not he to them.

3. He became a *joint maker* of the note—a joint promissor with *Dutton & Myers.* Name of maker may appear on *any part* of the note. *Story on Notes, section* 34. *Chitty on Bills, margin p.* 185, 186. *Taylor vs. Dobbins*, 1 *Strange, R.* 395. If *endorser's* name on the face, or at bottom of note, still a good endorsement. *Story on Notes, sec.* 121. *Story on Bills of Exchange, sec.* 204. *Gibson vs. Powell*, 6 *How. Miss. R.* 60.

So if *maker's* name on back of note, may still be maker. Endorser of note stands as drawer of a bill of exchange. *Story on Notes, sec.* 129. But what authority had *Sullivan* to draw in favor of *Violett & Dempsey* on *Dutton & Myers?* The latter had already promised to pay the former. The holder may write the words of note over the signature on the back; if *he* does not, the *law* writes it for him, and will give signature the same effect as if at bottom of the note. See *Josselyn vs. Ames*, 3 *Mass. R.* 274. *Hunt's Ad. vs. Adams*, 5 *Mass. R.* 361. *Hunt's Ad. vs. Adams*, 6 *Mass. R.* 519, 523. *Ulen vs. Kittredge*, 7 *Mass. R.* 233, 235. *White vs. Howland*, 9 *Mass. R.* 314, 316. *Moies vs. Bird*, 11 *Mass. R.* 438, 440. *Sumner vs. Gay*, 4 *Pick. R.* 311. *Tenney vs. Prince*, 4 *Pickering R.* 385, 387. *Baker vs. Briggs*, 8 *Pick. R.* 122, 130. *Oxford Bank vs. Haynes*, 8 *Pick. R.* 423. *Chaffee vs. Jones*, 19 *Pick. R.* 263. *Austin vs. Boyd*, 24 *Pick. R.* 64. *Knapp vs. Parker*, 6 *Vermont R.* 642, 645, 646. *Flint vs. Day*, 9 *Vermont*, 347. *Nash vs. Skinner*, 12 *Vermont R.* 220, 227, 229. *Martin et al. vs. Boyd*, 11 *New Hamp. R.* 385. *Beckwith vs. Angel*, 6 *Connect. R.* 317, 318, 319, 320. *Bright vs. Carpenter et al.* 9 *Ohio R.* 139. *Cooley vs. Lawrence*, 4 *Martin's Louisiana R.* 639. The principle recognized by these authorities is, that if *A.* puts his signature in blank upon a note, payable to *B.* or order, *at the time* of making of the note, *A.* becomes a *co-maker;* if *after* the making and delivery up of the note, then such signing constitutes *A.* a *guarantor.* See *Story on Notes, sec.* 58, 476. *Gist's Ad. vs. Drakely*, 2 *Gill's R.* 341. Until the case of *Hall vs. Newcomb*, 3 *Hill's N. Y. R.* 234, there was no *New York* decisions asserting a different doctrine. Some of them drew a distinction between notes payable to *A. or bearer*, and these payable to *A.* or *order*,—holding that blank signatures on the *former* by a third party, would constitute him merely an *endorser*, or the *latter* kind, a *joint maker.* See *Herrick vs. Carman*, 12 *Johnson R.* 159. *Nelson vs. Dubois*, 13 *Johnson*, 175, 178, 179. *Campbell vs. Butler*, 14 *Johnson*, 349, 351. *Tillman vs. Wheeler*, 17 *Johnson*, 326, 327, 328. *Seymour vs. Van Slyck*, 8 *Wendell*, 421. *Dean vs. Hall*, 17

Wendell, 214, 215, 216. *Hough vs. Gray*, 19 *Wendell*, 202, 203. *Seabury vs. Hungerford*, 2 *Hill*, 80, 83. *Miller vs. Gaston*, 2 *Hill*, 188, 190.

It seems that in *Hall vs. Newcomb*, 3 *Hill*, 234, the Supreme Court being *equally divided*, the judgment below was affirmed. The case was afterwards taken to the Court of Errors. See 7 *Hill*, 416,—and there twice argued. Judgment of Supreme Court affirmed. Should a single case *thus* decided outweigh the numerous decisions of six States of the Union, and the deliberate adjudications of a *Parsons*, a *Parker*, and a *Shaw*, of *Massachusetts*—of a *Spencer* and *Thompson*, of *New York*, and of a *Williams*, of *Vermont?*

4. The court below was right in not leaving it to the *jury* to construe the contract. In cases of signatures on *blank* paper, rule would be different. Here the note was filled up at the time of *Sullivan's* signing. The *law* then construes the contract. See 11 *Mass. R.* 122. 11 *New Hampshire*, 388. Parol evidence is inadmissible to explain or vary the written contract. If *Sullivan's* intention could be given in evidence, still it must be first shown that plaintiffs below had notice of such intention previous to accepting note. 11 *Mass. R.* 436. 12 *Vermont R.* 219. 9 *Vermont R.* 345. 6 *Vermont*, 642. There being no evidence of such notice, the question of intention could not have been submitted to jury. Different rule would enable *Sullivan* to perpetrate fraud on *Violett & Dempsey*. They are presumed to know the *law*, but not the notions of a *Harford* County jury. Relying on the construction which the law gave the signature, they regarded *Sullivan* as joint-maker, and therefore gave no notice of dishonor.

5. Not necessary that blank endorsement should have been filled up. See *act of* 1825, *ch.* 35. Point not having been raised below, cannot be taken advantage of here. 1825, *ch.* 117.

6. Sufficient consideration for *Sullivan's* signing to support action against him as joint-maker. *Story on Notes*, *sec.* 186.

By the court: JUDGMENT AFFIRMED.

JOHN B. EMERY AND CYRUS GAULT *vs.* CORNELIUS H. AND CALEB D. OWINGS, ADMINISTRATORS OF BEALE OWINGS. *December*, 1847.

The owner of the fee on which a stone quarry was situate, having mortgaged and leased the quarry, devised it to his son, and directed "that the rents arising from the quarry be applied to discharge the incumbrances on the same." *Held*, that the rents due at the testator's death passed to the son of the deceased, for the purpose of paying the incumbrances.

That the clause of the will did not separate the rents from the reversion.

If the application of the rents had been directed to the payment of the testator's debts, irrespective of the lands out of which they issued, the implication of a devise of the rents to the testator's executor could not have been repelled.

To executors only are confided the ascertainment and payment of testator's debts.

The construction of written contracts is to be declared by the court, and not submitted to the finding of the jury.

A lease granting the license, right and privilege of quarrying, getting out, working and carrying away granite stone, does not confer the right of carrying away rubble stone.

Granite stone is a known article of commerce, sold by the cubic foot, and is called dimension stone; while rubble stone is sold in the mass, or by the perch.

Where, as between lessor and lessee, the right existed to quarry and take away *granite* stone, and a payment was made under an agreement, that the same should be applied to the quarry rents thereafter to become due, and the lessor retained the money, he cannot set up, in opposition to the application of such payment to the rent, another claim, as for rubble stone, though connected with the quarry, due from the lessee to him.

The court will not issue a procedendo on reversal of a judgment, where they perceive from written evidence, as a receipt, that the plaintiffs cannot ultimately recover.

APPEAL from *Baltimore* County Court.

This was an action of *debt*, brought by the appellees against the appellants, to recover the sum of $750 debt. The plaintiffs counted upon a lease made by *Nicholas Owings*, deceased, to the defendants, of a granite quarry in *Baltimore* County, as owner in fee, dated 11th June, 1840, for the term of six years from the 10th November following. The lessees were to quarry forty thousand cubic feet in each year, *and pay one and*

one-fourth cents for each cubic foot rent, quarterly, and alleged that they entered upon the demised premises; that *N. O.* on the 7th July, 1841, *devised* the reversion of the leased premises to *Beale Owings*, for his natural life; that on the 30th December, 1841, *N. O.* died seized of the reversion. The declaration then proceeded to show the amount of rent up to the commencement of this action, and the periods at which the same accrued, &c.

The defendants pleaded *nil debet* with leave to give in evidence any special matter which might be pleaded in bar of the action upon notice, &c.

1st Exception.—Upon the trial the plaintiffs proved the lease declared upon, for the granite quarries known as the *Fox Rock or Fox Quarry*, with the right of quarrying the same in such quantities from time to time as the lessees' co-partners may have occasion in their business or may choose, not less than 40 M. cubic feet in each year during the demised term, yielding and paying to the lessor, &c. It was stipulated in the lease that it should not be construed to impair or affect the right or interest of, &c. under or by virtue of a mortgage theretofore executed by the said lessor, *Nicholas Owings*.

It was admitted that *N. O.* was dead, having first duly made and published his last will and testament, containing, amongst others, the following clause:

"It is my will and desire, that the rents arising from the quarry, known by the name of the *Fox Rock Quarry*, be applied to discharge the incumbrances on the same."

It was also in proof that the *Fox Rock Quarry* was a part of the real property which *Nicholas Owings* devised to his son, *Beale Owings*, the intestate of the plaintiffs in this action; that *Cornelius H. Owings* and *Francis R. Griffith* were appointed executors by the will of *Nicholas Owings*, and *Beale Owings* was in possession of the lands and premises devised to him; and that the defendants were in possession of the quarries and demised premises in 1841, 1842 and 1843. *Beale Owings* died on the 26th July, 1844, intestate, and that letters were granted to the appellees on his estate.

The defendants, after notice to the plaintiffs, and to show that the plaintiffs had no right to any of the rent claimed, which fell due after the 10th August, 1842, proved an assignment of the quarry from *B. O.* to *Edward Green*, dated 7th Oct. 1842.

The defendants further gave in evidence by *Matthew G. Emery*, that he was employed in cutting stone at the *Fox Rock Quarry*, in the year 1840; that in the summer of the year after *Noah Worthington* had torn up the rail-road running across his land, (being a part of the rail-road leading from said *quarry* to the *Baltimore and Ohio Road*,) and before said rail-road, thus torn up, had been laid down again—being on a visit at the house of *Nicholas Owings*—had a conversation with him respecting the said rail-road that had been torn up, and as to the prospect of its being laid down again; that in this conversation, *N. O.* said that he was very sorry it had been torn up, and that he did not know what he should do to get it put down again, as he had no money to pay to *Noah Worthington* the sum he demanded, that is, $866, the amount he had expended in law suits about said road, and that he, *Nicholas*, did not know what he should do, unless *Emery & Gault* would advance to him that sum; that on his next visit to *N. O.* he, *N. O.* said that *Emery & Gault* had advanced to him the said sum of $866, *to be taken out in rent of said quarry;* and that he, *N. O.* had sent the money over to *Mr. Worthington*, and that in consequence of said advance, he, the said *Nicholas*, would not receive any thing for two years, as it would take nearly that time to pay off said advance. The said witness, then upon examination by the *plaintiffs*, proved the following receipt:

"*Baltimore County, June 8th*, 1840.

"Received of *Emery & Gault* $866, to be returned them in *granite stone*, to the amount of sixty-nine thousand three hundred feet, without interest, between the 10th November, 1840, and the 10th November, 1846, they being at the expense of quarrying and transporting the same from my quarry, known as the *Fox Rock Quarry*. NICHOLAS OWINGS."

The defendants further gave in evidence by *Matthew G. Emery*, that he was present when *Gault*, one of the defendants, paid to said *N. O.* the sum of $101 85, and that the following receipt was given therefor.

"Rec'd, *Balt.* County, Feb. 19th, 1841, of *Emery & Gault*, $101 85, on account of quarry rent.

"NICHOLAS OWINGS."

The defendants also proved the following receipt:

Rec'd, *Balto.* Octo. 13th, 1841, of *M. G. Emery* for *E. N. Gault*, $20, on account of *Nicholas Owings.*

"C. H. OWINGS."

That he, the witness, did not pay the sum of $20 on account of rent due, *but on account of rent to become due.* It was to go on account of the lease.

The plaintiffs gave proof to rebut the parol evidence offered by the defendants, as to the application of the money advanced by them to *Nicholas Owings*, as an offset to the rent claimed in this action, and that it was paid on a different account.

The plaintiffs further gave in evidence by *Peter Gorman*, a competent witness, duly sworn, that he knows the *Fox Rock Quarry*, and knows what is called *Rubble stone.* There is a large amount of that kind of stone, including offal and dirt at the *Fox Rock Quarry*, that has been accumulating since the quarry was opened; that dimension stone are used in building warehouses, and for columns, &c. The dimension stone are the main object in opening a quarry; they are worth from 40 to 50 cents per cubic foot in *Baltimore;* that *Rubble stone*, if a man wants it, is worth from 50 to 75 cents, perhaps $1 per perch; that the witness, within five years past, received from the *Fox Rock Quarry* a few car loads of Rubble stone, which he used in building a house; that he purchased them of *Emery & Gault*, who delivered them on cars near to the house of the witness; that he paid $1 a car load, each containing about a perch and a half, equal to about thirty-seven cubic feet. There has been a good deal of Rubble stone used

in constructing the *Baltimore and Ohio Rail-road.* Dont know of any other sale or use by *Emery & Gault* of *Rubble stone* from the *Fox Rock Quarry*, except what he, the witness, took; that there is at the *Fox Rock Quarry* an immense heap of offal stone and rubbish, three-fourths of which is sand, and good for nothing; that forty thousand feet, or $500 worth, at the rate of one cent and a quarter per foot, might be got out in a year at the *Fox Rock Quarry.* It has always been considered that the expense of getting stone from that quarry was less than at other quarries.

The plaintiffs, further to support the issue on their part, and to rebut the evidence given on the part of the defendants, gave in evidence by *William Clary*, that he had been a stone-cutter for three years; that he considers the *Fox Rock Quarry* more advantageous for furnishing stone to the *Baltimore* market, by several cents in the foot, than other quarries. There is a descent from the quarry to the *Baltimore and Ohio Rail-road*, except for the distance of two hundred yards; that he, the witness, never knew any custom, at any of the quarries, to pay for the Rubble stone, neither at *Worthington*, which was worked in 1833, but not since, nor at the *Watersville Fox Rock*, or *Meadow Field Quarry.*

The plaintiffs and defendants offered testimony in relation to the value of dimension and rubble stone; the comparative facility of procuring them at the leased quarry; the facilities for transporting them to market,—which proofs are not deemed material to be published.

The defendants then prayed the direction of the court to the jury:—

1. "That under the will of *Nicholas Owings*, the rents of the *Fox Rock Quarry* did not pass to *Beale Owings*, the plaintiff intestate, and that the plaintiffs are therefore not entitled to recover in this action:" which direction the court (PURVIANCE and LE GRAND, A. J.,) refused to give.

2. That if the jury find from the evidence that the receipt offered in evidence by the plaintiffs, of the 5th June, 1840, was given by *N. O.* under an agreement that the same should be

applied to the payment of rents thereafter to become due from the defendants to said *Nicholas Owings*, from the *Fox Rock Quarry*, under the lease of the 11th June, 1840, and that the sum of *eight hundred and sixty-six dollars* has not been returned to said defendants by the said *Nicholas Owings*, to those claiming under him, or in any way satisfied, that then they must allow said receipt, or so much thereof as may be now due as an offset to the plaintiffs' demand, which instruction the court gave as prayed.

The plaintiffs then prayed the following additional instruction to the jury, to wit:—

"But if the jury find from the evidence, that the defendants are chargeable with the *Rubble* or offal stone, taken by them from said *Fox Rock Quarry*, and that they have taken out the amount of said receipt for $866, in said Rubble or offal stone, then the said $866 is not to be received in bar of this action. Notwithstanding, the jury may find that said $866 was agreed to be applied to extinguish the rents of said quarry:" which the court granted.

The defendants excepted to the instruction of the court, as well in refusing to grant the defendants' *first* prayer aforesaid, as in granting the additional instruction prayed by the plaintiffs.

The verdict and judgment of the court below being in favor of plaintiffs, the defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By HINKLEY and NELSON for the appellants, and

By R. J. BRENT for the appellees.

DORSEY, J., delivered the opinion of this court.

The defendants, by their first prayer, prayed the opinion of the court to the jury: that, under the will of *Nicholas Owings*, the rents of the *Fox Rock Quarry* did not pass to *Beale*

Owings, the plaintiff intestate, and that the plaintiffs are therefore not entitled to recover in this action: which opinion and direction the court refused to give. Whether the County Court were right or not in refusing this prayer, depends upon the true construction of that part of the testator's will, which relates to those rents. After devising to his son, *Beale Owings*, the *Fox Rock Quarry*, out of which the rents issue, the will proceeds as follows:

"And it is my will and desire that the rents arising from the quarry known by the name of the *Fox Rock Quarry*, be applied to discharge the incumbrances on the same."

This clause of the will, it is insisted, separates the rents from the reversion devised to *Beale Owings*; and by necessary implication, gives them to the executors of the testator. If the application of the rents had been directed to the payment of the debts of the testator, irrespective of the lands out of which the rents issue, it might have been somewhat difficult to repel the implication of a devise of the rents to the executors of the testator; because to the executors only is confided the ascertainment and payment of the debts of the testator. But by this clause in the will, the rents are not directed to the payment of debts generally, but to the discharge of the incumbrances on the *Fox Rock Quarry*. To whom then could the rents more appropriately be given to effectuate the design of the testator, than to him to whom the reversion was devised? He was as competent to make the application of them, directed by the will, as the executors of the testator; and much more deeply interested in their being faithfully applied. And further, it is not to be presumed to have been the intention of the testator to diminish the means of collecting the rents, and the certainty of their application to the object by him enjoined, which certainly would be the result of the implication contended for. Had the testator, by his will, have separated the rents from the reversion, and given them to his executors, the only means of their recovery would have been by an action of debt; but if suffered to pass to the devisee, according to the legal import of the devise, the rents could be recovered

not only by an action of debt, but by distress, which is justly regarded as much the more speedy, certain and efficient remedy for the recovery of rents. Of the rents when collected, the devisee becomes, as it were, a *quasi* trustee for their faithful application according to the will. So far from its being necessary to imply a devise of the rents to his executors, to effectuate the intent of the testator, there is every reason to presume his intent to have been the reverse of that, which, by such an implication, it is assumed to have been. There is, therefore, no error in the County Court's refusing the opinion and direction to the jury, sought by the appellants' first prayer.

The appellants' second prayer was upon the whole evidence. The defendants, by their counsel, prayed the court to instruct the jury, that if they find from the evidence that the receipt offered in evidence by the plaintiffs, of the 5th June, 1840, for the sum of $866, was given by *Nicholas Owings*, under an agreement that the same should be applied to the payment of rents thereafter to become due from the defendants to said *Nicholas Owings*, from the *Fox Rock Quarry*, under the lease of the 11th June, 1840, and the said sum of $866 has not been returned to said defendant by the said *Nicholas Owings*, or those claiming under him, or in any way satisfied, that then they must allow said receipt, or so much thereof as may be now due as an offset to the plaintiffs' demand, which instruction the court refused to give to the jury, but gave to them the following instruction, to wit: "But if the jury find from the evidence, that the defendants are chargeable with the Rubble or offal stone, taken by them from said *Fox Rock Quarry*, and that they have taken out the amount of said receipt for $866 in said Rubble or offal stone, then the said $866 is not to be received in bar of this action, notwithstanding the jury may find that said $866 was agreed to be applied to extinguish the rents of said quarry."

The testimony in this case being all received without objection, unless it be on the ground assumed in the court's instruction to the jury, it does not appear that any other reason existed for the court's refusal to grant the defendants' second prayer.

It becomes our duty, then, to inquire into the legality of the court's instruction, as regards the liability of the appellants to pay for Rubble stone. This liability the court referred to the decision of the jury; and in this we think the County Court erred.

It is a wise and well-established rule of law, that the true construction of written contracts is to be declared by the court, and not submitted to the finding of the jury. In the lease in question before the court, sufficient appears upon its face to show what was its true intent and meaning; what was the intention of the parties in entering into the contract. The lease describes the appellants, (the party of the second part,) as residents of the City of *Baltimore*, and partners in the trade and business of quarrying, cutting and selling granite stone, and carrying on the same under their co-partnership name and firm of *Emery & Gault*, and transfers to the appellants "the license, right and privilege of quarrying, getting out, working and carrying away granite stone from said quarry or quarries, to the use and benefit of said *Emery & Gault*, or the survivor of them, and the executors, administrators and assigns of such survivor, for the term of six years, they paying for the stone 1¼ cent per cubic foot." The very fact of the stone being sold by the cubic foot, in the absence of all other confirmatory parts of the lease, demonstrates that the stone sold and sought to be obtained under the lease, were dimension, not Rubble stone,—the former being always bought and sold by the cubic foot,—whilst it is believed, and may be safely asserted, that in *Maryland* no instance exists, or ever did exist, of Rubble stone being sold by the cubic foot. Such a rule of admeasurement is wholly inapplicable to Rubble stone, and is applicable to sales of dimension stone only, which are never sold by that species of measurement, if to be measured at all;—whilst Rubble stone is universally sold in the mass, or by the perch. This interpretation of the contract between the parties is strongly corroborated by the fact, that the appellants are stone-cutters in the City of *Baltimore*, and consequently use dimension stone only. Had they been stone-masons, there would have been

some plausibility in the argument that their contract embraced Rubble, as well as dimension stone.

The County Court did not err in rejecting the first prayer of the defendants below; but there is error in its refusal of the second prayer, and in the instruction which it gave in relation to the Rubble stone, and therefore its judgment should be reversed. *But no procedendo should issue;* because there appears to be but three-quarters of a year's rent due on the lease, for which any action could have been sustained by the pluintiffs below, and the set-off, to which the said defendants have shewn themselves entitled, far exceeds that amount.

JUDGMENT REVERSED.

THOMAS IRWIN, JR. *vs.* HARRIET G. C. SPRIGG.
December, 1847.

When a plaintiff may, by the exercise of ordinary care and diligence, avoid an injury arising from a nuisance, erected or maintained upon a public street in a populous city by the defendant, and did not exercise such care and diligence, he cannot recover damages for a personal injury arising from such nuisance Under such circumstances, he must bear the consequences of his own folly.

An area intended to furnish light to the basement of the defendant's house, opened in the pavement of a public street, in a populous city, is a public nuisance of a dangerous character, which the owner of the house, when it was erected, and all subsequent purchasers, are bound to render secure. It is an act of wrongful negligence not to protect it from persons passing through such public street, and renders the possessor of the house liable for the accidents which may result therefrom.

It is no defence in such a case that the area was open, or had been opened, before the defendant became the possessor of the property; when he took possession, he was bound to guard against the danger to which the public had been before exposed.

APPEAL from *Baltimore* County Court.

This was a special action on the case, brought by the appellee against the appellant, as the possessor and occupier of a certain house, near unto a common street, in which said street

there was and is, a certain area before a certain basement window of, and belonging to the said house, for the purpose of admitting light into said window; that the defendant, &c. wrongfully permitted the said area to be and continue, without any fence, railing, cover or protection, by means whereof the plaintiff was injured and damaged, as stated in the proof. Plea, *non cul.*

The plaintiff, at the trial of this cause, offered in evidence by *Mrs. Stewart*, that on the evening of the 10th February, 1844, she, together with her sister, the plaintiff, were returning to witness' house, and in going down *Perry* street, (formerly called *Peace* alley,) on the footway, near defendant's house, the plaintiff fell or trod into an area made to light the cellar window of the defendant's house, and broke her leg, above the ankle, in two places; that said area is made by excavating the pavement leading along the *north* side of *Perry* street, designed for the convenience of foot passengers; that there is no foot pavement on the *south* side of *Perry* street, nor on the north side, except along defendant's house to his gate; that when said accident occurred, witness was walking before, and plaintiff near behind her, and plaintiff exclaimed that she had fallen into said area, and broken her leg. Witness assisted her to get out of said area, but she could not rise, and a gentleman, named *Banks*, came and assisted them, and the plaintiff was carried to witness' house, where a physician was sent, who set her leg; that she supposes said area was a yard deep, and perhaps more; but witness could not tell the width of the opening; that it was protected neither by bars, nor covering of any sort, for the last twelve years, nor before that, as well as she could remember, and was, in the opinion of witness, dangerous; that witness has lived in said street, formerly *Peace* alley, for nineteen or twenty years, to the east of the house of the defendant, and of the area into which the plaintiff, (her sister,) fell; that the footway between said area and the curb-stone is narrow, so as that it will not admit of two persons, walking side by side; that the weather was cold on that night, and there was snow on the ground, but this foot-

way was cleared of snow. And said witness being cross-examined, further stated that she had lived in *Perry* street, a few steps east of defendant's house, for nineteen or twenty years; that the plaintiff, her sister, lived in a court running from *Charles* street, about two squares off, and to the north-east of witness' dwelling, which is east of the defendant's house; that plaintiff visited witness very often; that the opening is very large, and is nearly as wide as the whole of the rest of the pavement; that there is a great descent in the pavement, in the direction in which the plaintiff and witness were going; that the area and window were on their left hand as they went along, and the right leg of the plaintiff was the one broken; that plaintiff is fifty-five or fifty-six years old. The area was covered soon after the accident occurred. That *Perry* street was formerly called *Peace* alley, and is of the ordinary width of alleys; two carts could not pass each other in it. On her examination in chief, witness further stated that plaintiff was confined to the house of the witness for five or six weeks, during which she suffered great pain and agony; and that although she can now use her limb, it is much impaired in strength.

The defendant proved that the house of the defendant had been built a great many years, forty or fifty years ago; that defendant purchased it twelve or thirteen years ago; that at that time the window and area were there, as they are now; that the area is a segment of a circle, whose widest part is twelve or thirteen inches; and that the footway left opposite to it is two feet six inches wide; that the whole footway is about three feet wide; and that a person using ordinary care and caution would not, in the opinion of the witness fall or step into said opening; that a person walking down said alley would be thrown off from the wall by the shoulder or arm, sufficiently far to prevent him from stepping into said area, and that it could hardly happen, unless the person rubbed against the wall; that such areas are very common in the streets and alleys of the City—particularly in houses built many years since; and that many of the areas before the houses of the City are much larger than this window, and no more protected.

The defendant prayed the court to instruct the jury:

1st. That if they find from the evidence that the plaintiff might, by the exercise of ordinary care and caution, have escaped the injury for which this action is brought, and did not exercise such care and caution at the time when the accident occurred, and that but for the want of such care and caution she would not have sustained the injury complained of, then the plaintiff is not entitled to recover, even if the jury shall believe that the injury was caused by falling into the window of the defendant.

2d. That the plaintiff is not entitled to recover for the injury complained of, unless the jury are satisfied from the evidence that the said injury was occasioned by the want of ordinary care and prudence on the part of the defendant, or some agent of his.

3d. That if, from the evidence in the cause, there is a reasonable doubt in the minds of the jury, whether said injury complained of by the plaintiff, was occasioned by the want of ordinary care and prudence on the part of the defendant, then the plaintiff is not entitled to recover.

4th. That the mere existence of the window, as proved in the cause, is not evidence of a want of ordinary care on the part of the defendant—there being no ordinance of the city forbidding it. The court, (Purviance and Le Grand, A. J.,) granted the first prayer, but refused to grant the second, third and fourth prayers, and each of them.

The defendant excepted.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence, Magruder and Martin, J.

By Lloyd for the appellant, and
By Nelson for the appellee.

Martin, J., delivered the opinion of this court.

This was an action on the case instituted in *Baltimore* County Court, by the appellee against the appellant, to recover

damages for an injury alleged to have been sustained by falling into an open area in front of the house of the appellant on *Perry* street, in the City of *Baltimore*. Issue was joined on the plea of not guilty, and it is only necessary to refer with particularity to that portion of the testimony which related to the size and character of this area.

Upon this subject, the plaintiff proved at the trial of the cause, that the area was made by excavating the pavement leading along the north side of *Perry* street, and it was designed to light the cellar window of the defendant's house. That it was about a yard deep; that it was protected by neither bars nor covering of any sort for the last twelve years, and that it was, in the opinion of the witness, dangerous.

That the footway between the area and the curb-stone is so narrow that it will not admit two persons to walk side by side. The plaintiff also proved by a witness, that he had measured the area, and that it was fifteen inches wide at its widest projection into the pavement.

The defendant then proved by a competent witness, that the house of the defendant had been built forty or fifty years since, and that the defendant had purchased it twelve or thirteen years ago; that at the time the defendant purchased the house, the area and window were there, as they are now; that they have not been altered; that the area is a segment of a circle, whose widest part is twelve or thirteen inches, and that the footway left opposite is two feet six inches; that the whole footway is about three feet wide. And on his cross examination, this witness stated, that he remembered the area before the defendant bought the house, and was satisfied that the area is now as it was before the purchase, and that the space left outside of the said opening, and between it and the curb-stone for a footway, is double the width of the opening. The plaintiff proved the nature and extent of the injury she received; and in this condition of the case, the counsel for the defendant asked the court to give to the jury the following instructions:

1st. That if the jury find from the evidence that the plaintiff

might, by the exercise of ordinary care and caution, have escaped the injury for which this action is brought, and did not exercise such care and caution at the time when the accident occurred, and that but for the want of such care and caution she would not have sustained the injury complained of, then the plaintiff is not entitled to recover.

2d. That the plaintiff is not entitled to recover for the injury complained of, unless the jury are satisfied from the evidence that the said injury was occasioned by the want of ordinary care and prudence on the part of the defendant, or some agent of his.

3d. That if from the evidence in the cause there is a reasonable doubt in the minds of the jury, whether the said injury complained of by the plaintiff, was occasioned by the want of ordinary care and prudence on the part of the defendant, then the plaintiff is not entitled to recover.

4th. That the mere existence of the window, as proved in the cause, is not evidence of a want of ordinary care on the part of the defendant, there being no ordinance of the city forbidding it.

The first instruction was granted, and no doubt can be entertained about the correctness of the legal proposition embodied in that prayer, and affirmed by the court.

The established doctrine now is, that although the defendant's misconduct may have been the primary cause of the injury complained of, yet the plaintiff cannot recover in an action of this kind, if the proximate and immediate cause of the damage can be traced to a want of ordinary care and caution on his part. Under such circumstances he must bear the consequences of his own recklessness or folly.

In the case of *Butterfield vs. Forrester*, 11 *East.* 61, *Lord Ellenborough* said:—

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.

"Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Flower vs. Adam*, 2 *Taunt.* 314. *Lane vs. Crombie*, 12 *Pick.* 177.

It appears that under the law, as thus expounded by the court, the jury rendered a verdict in favor of the plaintiff, and have therefore negatived the idea that the injury she sustained was attributable to the want of ordinary care and caution on her part.

The *second*, *third* and *fourth* prayers addressed to the court, raised substantially the same question, and were intended to present this proposition: That under the circumstances of this case, the fact, that the defendant permitted this area to remain open, and unguarded, after he became the owner of the house to which it was appurtenant, could not be regarded, in legal contemplation, as constituting a public nuisance, particularly as this was the exact condition of the premises at the time he purchased them; and that therefore he was not responsible, unless the jury were satisfied that the injury was occasioned by the want of care and prudence on his part. This proposition was over-ruled by the court, and we think correctly. The existence of an area, open and unprotected, like that described by the witnesses in this case, is an unauthorized and illegal obstruction of a public street in a populous city of a most aggravated and dangerous character, and is therefore a public nuisance; and although the defendant did not originate the nuisance, yet as he subsequently became the owner of the house to which it belonged, the law imposed upon him the obligation to render it secure.

In *Coupland vs. Hardingham*, 3 *Campbell's Rep.* 398, an action was instituted against the defendant for negligence in not railing in or guarding an area before his house in *Wood street*, *Westminster*, whereby the plaintiff fell down into the area, and was severely hurt.

It appeared that before the defendant's house there was an area, which was descended to by three steps from the street, and from which there is a door leading into the basement story

of the house; there is no railing or fence to guard the area from the street; the plaintiff passing by in a dark night, fell in, and had his arm broken.

The defence set up was that the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them. But *Lord Ellenborough* held:

"That however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. That the area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure."

The case of *Coupland vs. Hardingham*, which we have just cited from 3 *Campb.* 398, is similar in all its features to the one at bar, and we consider unnecessary to add a single word to the reasoning of *Lord Ellenborough* upon this subject. We think the ruling of the court below was correct upon all the points raised by the defendant's prayers, and that their judgment must be affirmed. JUDGMENT AFFIRMED.

WILLIAM C. CUNNINGHAM AND OTHERS *vs.* GEORGE SCHLEY AND OTHERS.—*December*, 1847.

It is not necessary for a trustee, in his published notice of sale under a decree, to state the names of the parties to the suit in which the decree was passed; nor the several deeds creating incumbrances on the property offered for sale.

A decree directed that the real estate of *J.* deceased, in the proceedings mentioned, or so much as may be necessary to pay his debts, be sold; and although it does not say in terms, that the title of the parties to the suit should be sold, still a sale under the decree would pass such title.

A notice of sale, which states that by virtue of a decree of the Court of Chancery, there will be sold certain real estate, naming the tracts, giving their locality, of which *J.* died seized and possessed, is a notice that there must

be parties to the decree,—and in the absence of evidence, that competition in the purchase was prevented by the character of the notice, or that the sale was, in any respect, prejudiced thereby: a sale under such notice should not be vacated.

A defendant in a cause, under such a decree, cannot object that the trustee did not, in fact, sell the interest of the parties to the suit, but only of one of them. Such an objection might come from a purchaser, who is alone injured by it.

Where a defendant, whose title is decreed to be sold, knows of any fact which would disperse a cloud on the title decreed to be sold, and omits to communicate it to the trustee in due time, it does not become him, when a sale has been made, to interpose it as an objection to the ratification of sale against purchasers.

When a sale is objected to on the ground of inadequacy of price, which may be traced to doubts about the title, it becomes material to inquire, whether the trustee might not, by reasonable efforts, have removed the cloud.

Where, from the nature of the doubt, no diligence on the part of the trustee could remove it, he may proceed to a sale, and the parties may refer its solution to the judgment of the court

Where a sale reported was of a private sale, made for a much larger sum than could be obtained at an offer at public sale, duly made by a trustee, inadequacy of price is no objection to the private sale.

An event which happens subsequent to a reported sale, and which, in the opinion of many persons, has enhanced the value of the property sold, ought not to affect such reported sale.

In *Andrews vs. Scotton*, 2 *Bland*, 643, it was decided, "that if a trustee directed to sell by decree at a public sale, sell, at private sale, the sale will be confirmed, if satisfactory reasons are given for so doing, and *no objection is made*." These latter words mean *objections of sufficient force*, to outweigh the reasons given by the trustee for deviating from the terms of the decree.

Where a trustee did not undertake to sell at private sale until a fruitless effort had been made at public sale, according to the terms of the decree, and even after such failure kept the property in the market by advertisements offering it at private sale, and procured a greater price at private than he had been offered at public sale—the court will not consider his conduct a substantial deviation from the decree, but only one offered from necessity.

Chancery will ratify an act when done, which upon a previous application, would have been ordered.

Whilst the Chancellor would consider it his duty to vacate sales made by officers of his appointment, under the influence of error, fraud, misrepresentation, or injurious mistake, still it would be fatal policy to be astute in finding out objections to them.

Where a trustee's bond is not stamped, but was filed and approved by the Chancellor, and the trustee proceeded to make the sale as decreed—this is not a ground for vacating the sale; but the Chancellor, on application, will require the trustee to file a new bond.

APPEAL from the Court of Chancery.

The bill was filed on the 6th December, 1842, by *Robert M. Gibbes* and others, creditors of *James Cunningham*, deceased, against his heirs-at-law and others, for a sale of his real estate for payment of his debts. It, amongst other things, stated that *Cunningham*, in his life-time, on the 21st October, 1835, conveyed to *Henry Wayman*, (one of the defendants,) certain of his lands in trust; but that said trustee has altogether neglected and refused to execute the trust, or sell the property conveyed to him.

Wayman, by his answer, admitted the conveyance to him in trust as stated; but averred "that he has not sold the land, because he was unable to obtain any thing like its value, and no one interested in the same has urged a sale, which would have been a sacrifice of it."

The answers of the other defendants are immaterial. A commission was issued to take testimony, under which the complainants proved their case. And a decree was passed on the 13th April, 1846, "that the real estate of *James Cunningham*, deceased, in the proceedings mentioned, or so much thereof as may be necessary for the payment of his debts, be sold; that *George Schley*, of *Washington* County, be appointed trustee to make such sale, whose course and manner of proceeding shall be as follows," &c. The trustee bonded accordingly.

On the 17th June, 1847, the trustee reported, after giving notice of the time, place, manner and terms of sale, "by advertisement in the '*Alleganian* and *Civilian*'" newspapers, printed at *Cumberland;* the "*Torchlight*," a newspaper printed at *Hagerstown*, and the "*Patriot*," a newspaper printed at *Baltimore*, for more than three successive weeks before the day of sale; he did, pursuant to said notice, attend at *Cumberland* on Tuesday, the 8th September, 1846, and proceed to offer said real estate for sale; that he was notified of a claim of title to "*Latent Worth*," one of the tracts of land embraced by the decree, arising by virtue of a purchase of the same at

collector's sale; that he then received, as a bid for the same, the sum of five cents per acre; and that all efforts, at an advance upon said bid, failing, your trustee refused to sell; that the sum of six cents per acre was offered for "*Glen Eyry*," and the sum of twenty-six cents per acre for another tract, called "*Muddy Creek*," and that no advance could be had upon said bids; that your trustee refused to sell at the prices aforesaid, and shortly thereafter offered said lands for sale *at private sale*, by advertisement in the "*Civilian* and *Alleganian*," two papers printed at *Cumberland;* that although said advertisement has been continued in said papers from the period aforesaid to the date of this report, your trustee has received but one proposal for a purchase, which he has accepted by entering into a written contract, herewith filed, with the purchaser, from which it will appear that he has sold the right, title, interest and estate of *James Cunningham*, deceased, in and to the lands mentioned therein, to *Jacob Markell*, of *Frederick*, for the gross sum of $3,000—said sum to be paid in cash upon the purchaser being notified by the trustee of the final ratification of this sale; that said *Markell* is a man of means, and able to meet his engagement to pay at the time stipulated. The trustee reported briefly, the reasons that induced him to sell so large a number of acres for nominally so small a sum. "He found that he could not sell by the acre, unless he would undertake to have the land surveyed, as the present purchaser refused to be governed by the number of acres expressed in the patents, he having been informed that the area of the said land had been ascertained by calculations based upon reference lines, and not from actual measurement of the land by a survey of the same. The expense of the survey of so large a body of land, in a county thinly settled, forbade this mode of ascertaining the true quantity of land—your trustee having been informed by a practical surveyor that it would cost $600 or $800. The claim of title to "*Latent Worth*" added another impediment to a sale by the acre. The rough and rugged character of these lands, embracing within their area, mountains—their distance from any market—their great length

and poverty of breadth, winding for miles among elder tracts—their present trifling intrinsic, and their very doubtful prospective value, all combined to bring the mind of your trustee to the conclusion, that he could not effect a better sale, and he accordingly concluded the sale now reported. The trustee further reported, that at the time of advertising said sale, he gave notice to the creditors of said *James Cunningham*, deceased, to file their claims, with the vouchers thereof, in, &c. within four months from the day of sale, and he exhibits, as part of this report, a copy of the first said notice of sale, marked T. R. No. 1; also a copy of the said second notice of sale, that with a view of placing all the facts which have come to his knowledge before the Chancellor, he reports that on the 22d December, 1846, a certain *Henry Wayman*, one of the parties to the bill filed in this cause, and a creditor, as he alleges, of said *Cunningham*, deceased, wrote to your trustee, stating that he had received a letter from *Duff Green*, of *Washington* City, inquiring about the lands embraced by the decree in this cause, as he wished to purchase them for a *Northern Company*, and to know the lowest price for them; that he, the said *Wayman* had answered his letter, and fixed the price at fifty cents, which he thought had better be taken, if such a sale could be made by the trustee, or the writer. To this letter your trustee replied, expressing his readiness to receive and consider any proposition for a purchase from said *Green*, and desiring *Mr. Wayman* to so state to *Mr. Green;* from that time until the 24th May, 1847, nothing was heard from said *Wayman* or *Green*. On said day, your trustee received the letter, herewith exhibited, marked T. R. No. 3, and filed as part of this report; also subsequently the letter, herewith filed, marked T. R. No. 4; all which is respectfully submitted to the consideration, and for the further order of the Chancellor.

Contract of sale filed by Trustee.

"Articles of agreement made this 15th May, 1847, by and between *George Schley*, trustee for the sale of certain parts

of the real estate of *James Cunningham*, deceased, of the one part, and *Jacob Markell*, of the other part. The said *Schley* hereby agrees to sell to the said *Markell* all the estate, right, title and interest of the said *James Cunningham*, deceased, of, in and to three tracts or parcels of land, viz: "*Glen Eyry*," "*Latent Worth*," and "*Muddy Creek*,"—the same being situate in *Allegany* County, in the said State, at and for the price or sum of $3,000—the said sale to be subject to the approval of the said court,—and the said sum of $3,000 to be paid by the said *Markell* upon the ratification of the above sale by the *High Court of Chancery of Maryland.* And the said *Markell*, on his part, hereby agrees to pay the said sum of $3,000, for the interest of the said *Cunningham* in and to the above described lands, upon the ratification of the sale thereof by the *High Court of Chancery of Maryland.* In testimony whereof, the said parties have hereunto set their hands and seals on the day and year first above written.

The said *Schley*, on his part, agrees to execute a good and sufficient deed, conveying the interest, right, title and estate of the said *Cunningham* in and to the above lands, to the said *Jacob Markell*, upon receiving the purchase money thereof, as above stipulated: and as further and more particular description of the above lands, and not as guarantee of their area or contents, it is herein stated that "*Latent Worth*" is supposed to contain ten thousand seven hundred and sixty-one and six-eighths acres of land; "*Glen Eyry*," four thousand six hundred and twenty-four, and "*Muddy Creek*" five hundred and sixty-five and one-eighth acres of land.

GEO. SCHLEY. [Seal.]
JACOB MARKELL. [Seal.]

T. R. No. 1.—*Trustee's Sale.*

"By virtue of a decree of the High Court of Chancery of *Maryland*, *I will offer at public sale*, in the Town of *Cumberland*, on Tuesday, the 8th September next, between the hours of 10 o'clock A. M. and 4 P. M. the following valuable real estate, (or so much thereof as may be necessary for the

payment of debts,) of which *James Cunningham* died seized and possessed, situated in *Allegany* County, in said State.

"No. 1.—A tract of land, called '*Muddy Creek*,' containing five hundred and sixty-five and a half acres.

"No. 2.—A tract of land, called '*Glen Eyry*,' containing four thousand six hundred and twenty-four acres.

"No. 3.—A tract of land, called '*Latent Worth*,' containing ten thousand seven hundred and sixty-one and five-eighths acres.

"These lands lie west of *Cumberland*, at no great distance from the *Western* or *National Turnpike Road*, and form a portion of that country, usually styled 'The *Glades*.' They are admirably adapted to the growth of rye, oats, grass and potatoes, well supplied with water and timber, and are among the best grazing lands in *Maryland*. A more detailed description is deemed unnecessary, as those desirous of purchasing are invited to call on *Mr. William Cunningham*, who resides thereon, and who will shew them to all wishing to view them.

"The terms of the sale prescribed by the decree, are as follows: one third, &c.

"The trustee is directed to convey to the purchaser or purchasers, the property to him or them sold, by a good and sufficient deed.

"The creditors of *James Cunningham*, deceased, are hereby notified to file their claims, with the vouchers thereof, in the Chancery Office, within four months from the above day of sale. GEO. SCHLEY, *Trustee*."

August 15th.

T. R. No. 2.—Trustee's Sale.

By virtue of a decree of the High Court of Chancery of *Maryland*, *I will offer at private sale*, (having failed to sell at public sale,) the following valuable real estate, or so much thereof as may be necessary for the payment of debts,) of which James Cunningham died seized and possessed, situate in *Allegany* County in said State, &c. then as in the above notice of sale.

T. R. No. 3.

Washington, 24th May, 1847.

Sir,—My father was authorized by *Mr. Wayman* to sell *Cunningham's* lands in *Allegany*—fifteen thousand nine hundred and fifty acres—and has made a sale in conformity with *Mr. Wayman's* instructions. I see by an advertisement in a *Cumberland* paper that you are a trustee, under a decree of the court, to make the conveyance; will you please let me know, by return mail, whether you are prepared to make the conveyance, or whether it must be first ratified by the court, and whether it will be convenient for you to come here to receive the money and make the conveyance.

Your ob't servant,

George Schley, Esq. BEN. E. GREEN.

T. R. No. 4.

Washington, 10 *June,* 1847.

Dear Sir,—During the last winter, I was authorized by *Mr. Wayman* to sell three tracts of land, situated in *Allegany*, containing near sixteen thousand acres, at 50 cents per acre, for which he was to allow me a commission of 4 per cent. on the sale. On the 16th April, I wrote to him that I had made a sale, subject to the examination of the party, and that he must hold himself in readiness to make the deed. On the 24th May, I wrote to him through my son, saying, that the arrangement was concluded, and wished to know when and where he would receive the money. In reply, he wrote to me that you, as trustee, had sold the land to other parties, and in reply to a letter to you, you wrote to the same effect. I have since received letters from *Mr. Thomas* and *Mr. Markell*, saying that they had purchased from you. I have seen *Mr. Wayman*, and he will oppose the ratification of the sale made by you, and he requests me to report the sale made by me to you. I have sold the lands to *Benjamin E. Green* for fifty cents per acre, and he is prepared to pay the money as soon as the requisite deeds

are delivered. I write this that you may also report these facts, that the whole subject may be before the Chancellor.

Yours truly,

George Schley, Esq. DUFF GREEN.

The Chancellor passed an order of ratification *nisi* the 17th August, 1847.

The defendant, *Wayman*, excepted to the sale.

1st. Because the public were not properly advised of the title in the property thus sold, which the trustee had the power to sell. The trustee does not state in any of his advertisements the names of the parties to the suit in Chancery, or the date of the decree,—and as various deeds were executed by *James Cunningham*, and the trustee lived remote from the land, proper information could not be readily obtained, and especially as it did not appear by the said advertisements that the titles of your petitioner and *Richard G. Stockett*, mortgagees and trustees, were directed to be sold by the said decree.

The trustee, in his advertisement, states that he sells "the land of which *James Cunningham* died seized and possessed, &c." and not the title of the parties to the suit, as directed by the decree. Whereas, by the proceedings, it does appear that *Cunningham* had conveyed all this land, by deed of trust in his life-time, to your petitioner—the original of which deed is herewith filed.

2d. Because the trustee did not, in fact, sell all the interest of the parties, as by the decree he was bound to do, but sold only the interest and title of which *James Cunningham* died seized, as will appear by his report, and the contract of sale, exhibited with his report, and his letter to this petitioner, herewith filed.

3d. Because there was alleged to be an outstanding tax-title in some purchaser under the tax laws, which title your petitioner found, on consulting an attorney, was so defective as to be worthless; yet to prevent any supposed injury which a tax-title might cause in the contemplated sale, your petitioner had a legal tender of the taxes, and the premium and costs made in

due time and according to law, so as to entitle him to redeem the same, if it had been regularly sold, which tender was refused by the said tax purchaser, whereby your petitioner is advised that the right of the said tax purchaser, if any he had, was released, and the title became re-invested in the former owners, which information, in relation to the tender, &c. as above stated, this petitioner believes was unknown to the said trustee at the time of the sale, as will appear by the papers herewith filed, and which he intended to commmunicate before the sale thereof.

4th. Because this petitioner, by reason of the facilities afforded him, having for a long time been negotiating for the sale of this property, as he thought he had a right to do, with the approbation of the trustee, did, before the sale made by the trustee reported, actually contract for the sale of this land, at the rate of fifty cents an acre, for the quantity as called for by the patents, without survey, containing by the estimate about sixteen thousand acres—to *Benjamin E. Green* and *Duff Green*, or one of them; the cash to be paid at the ratification of the sale and the delivery of the deed, deducting therefrom five per cent. allowed the said *Duff Green* for making the sale thereof, as will appear by Exhibits H. W. Nos. 5, &c. and making the purchase money nearly $8,000, (all of which he thought he was doing with the approbation of the trustee,) whereas the trustee's sale was for only $3,000; that immediately on the communication of these terms of sale by *Green*, this petitioner made the same known to the said trustee, as he had done during the previous negotiations, and was surprised to hear that the trustee had made sale as aforesaid, to *Jacob Markell* and others, without any previous notice to this petitioner.

5th. Because this petitioner, in all his conversations and correspondence with the said trustee and *Francis Thomas*, one of the purchasers, and with all interested, had insisted on obtaining not less than fifty cents per acre—a sum which the property is fully and fairly worth, and made the same known to all the said persons.

6th. Because the said sale, as reported by the said trustee,

was a private sale, made without any notice given to the public generally, or to your petitioner in particular,—although your petitioner expected a public notice thereof; and although it was known to the said trustee, and to the said *Francis Thomas*, as your petitioner believes, that your petitioner was negotiating with the said *Green* for the sale of these lands, as will appear by reference to the trustee's report, and the exhibits herewith filed, marked Exhibits H. W. Nos. 2, &c.; that the court will ratify and confirm the sale, so as aforesaid made by the said *Henry Wayman* to the said *Duff Green*, after setting aside the sale, so as aforesaid reported by the said trustee.

7th. That the said *George Schley* has not executed a bond for the faithful performance of his duties as trustee, according to law and the terms of the said decree—the paper filed by the said *George Schley* having no stamp thereon.

8th. Also, because, since the offer to purchase made to the trustee by *Jacob Markell* and others, as reported, the *Baltimore and Ohio Rail-road Company* have fixed on their *western terminus*, and are about to prosecute the continuance of their *Rail-road* to the *Ohio* river, which road will pass near, if not through the lands for which the offers aforesaid were made, and thereby has, since said offers, greatly increased the value of said lands.

Exhibit H. W. No. 1, was the indenture made on the 21st October, 1835, between *James Cunningham* and *Catherine Cunningham*, his wife, of the one part, and *Henry Wayman* of the other part, for the trust under which the decree passed.

The record contained letters from *Geo. Schley*, the trustee, to *Henry Wayman;* from *Duff Green* to *F. H. Thomas*, interested in the purchase from *Thomas* to *Green* and *Wayman;* a contract of the 9th June, 1847, between *Wayman* and *Green*, for the sale of the land, with the conditions of such sale. Letters from *Green* to *George Schley;* all which are sufficiently adverted to in the opinion of the Chancellor in this cause.

The trustee, *George Schley*, in reply to the first objection to the ratification of his sale, stated that by reference to his report and accompanying vouchers, it will appear that the sale of the

land of *James Cunningham*, deceased, was advertised in four newspapers; two in the county where the lands were situate, one in *Washington* County, and one in the City of *Baltimore*. The trustee deemed the notice of sale sufficiently diffused by the extended circulation of these papers. The advertisement offered for sale the real estate, (or so much thereof as might be necessary for the payment of debts,) of which *James Cunningham* died seized and possessed, situate in *Allegany* County. The decree directed, that the real estate of *James Cunningham*, deceased, in the proceedings mentioned, or so much thereof as might be necessary for the payment of his debts, should be sold. It will be perceived that the advertisement is "*ad idem*" with the decree, and in compliance therewith, your trustee admits that the idea that it was necessary for him to state in his advertisement the names of the parties to the suit, and the date of the decree, has never been diffused as widely as his notice of said sale. The novelty of the objection attracted the attention of this respondent to the various notices of sale, under decrees of the High Court of Chancery, to be found in the *Baltimore* papers; and in no instance has he been able to find the names of the parties, and the date of the decree stated. Upon consultation with some of the oldest practitioners in said court, he discovered that the idea aforesaid was as novel to them, as it confessedly is to this respondent.

2D OBJECTION.—In reference to this objection, the trustee states now, as already stated in his report, that objection was made by the purchaser to your trustee determining the number of acres of land by the number expressed in the patents, and that further difficulty was made, because of the cloud hanging over the title, by reason of the claim of title under a sale made by the collector of taxes of *Allegany* County. To guard against all difficulty, either as to title, or number of acres, your trustee proposed to sell *Cunningham's* interest, as contra-distinguished from any claim of title to be asserted by strangers, or abatement of price, to be claimed because of deficiency of number of acres, conceiving that he was in this mode selling all he was authorized by said decree to sell,

most beneficially for said estate; and the purchaser being all the while under the impression, that he was buying all that said decree authorized to be sold. In making the sale in the mode he did, your trustee was governed, in great measure, by the suggestions of an experienced and distinguished solicitor, as will appear by the letter, herewith filed, marked G. S. No. 1.

3D OBJECTION.—The facts set forth in this objection are novel to the trustee, except that he had heard that one or more attorneys had pronounced said sale defective.

4TH OBJECTION.—Your trustee most positively and emphatically denies any communication on the part of *Mr. Wayman*, of a sale made by said *Wayman* to *Green*, *until after your trustee had made the sale reported by him*,—and he herewith exhibits, as part of this answer, the only letter he received from said *Wayman* prior to said sale, on the subject of a purchase by said *Green* of said lands. Your trustee also exhibits, as part of this, his answer, a letter from said *Wayman*, which sufficiently explains why the trustee was ignorant of the offer of *Green*, until it was too late to accept it.

5TH OBJECTION.—Your trustee has answered this objection in his report, and he refers your Honor to it, as containing his views of the value of said lands.

6TH OBJECTION.—In answer to this objection, your trustee refers to the printed notices of *private sale* accompanying his report.

The said trustee, further answering, says that the said sale was made by him under the belief at the time, that it was the highest price he could get for the lands, *after having in vain tried to sell at public sale, and after having advertised them for months in the newspapers at private sale, without an offer.*

That the said sale was, as far as he was concerned, a fair *and bona fide* sale, and one that he supposed at the time he made it, would be regarded and treated by this court as binding and obligatory on all the parties as if it had been made under the hammer, when he first offered the property at public sale. If, however, he is mistaken in this, and the said sale should be set aside, he will then proceed to offer the said land for sale

again, in such manner as this Honorable Court shall order and direct.

The objections to the ratification of the sale were further answered in detail by *Jacob Markell* and *Francis Thomas*, parties interested in the purchase. They filed a large number of letters, to which no further notice need be paid than what is contained in the Chancellor's opinion.

The letters were all admitted to be originals.

The exceptions to the sale having been heard, the Chancellor, (JOHNSON,) on the 10th September, 1847, delivered the following opinion:—

On the 6th December, 1842, a creditor's bill was filed in this court by *Gibbes and others*, as the executors of *Robert Oliver*, the administrators of *Horatio McPherson*, and the administrators of *John McPherson*, against the heirs of *James Cunningham*, who died in November, 1835, for the sale of his real estate, the personal being insufficient to pay his debts. The said real estate was stated in the bill to consist of a tract called "*Glen Eyry*," a tract called "*Latent Worth*," and a tract called "*Muddy Creek*," lying in *Allegany* County in this State; one other tract called "*Cheviot Dale*," and other parcels of land in this State.

It was alleged in the bill, that *Cunningham* in his life-time had executed a mortgage of a portion of his lands to *Henry Wayman* and *Richard G. Stockett*; but of what portion, or for what purpose, the complainants did not know. That on the 21st October, in the year 1835, he, *Cunningham* and wife, executed a deed of trust to the said *Wayman*, but that the trustee had neglected and refused to execute the trusts in any manner.

The heirs of *Cunningham*, his personal representatives, and *Stockett* and *Wayman*, were made parties defendants.

The deed from *Cunningham* and wife to *Wayman*, conveys to the latter the before mentioned tracts of land, lying in *Allegany* County, of which "*Latent Worth*" is said to contain ten thousand seven hundred and sixty-one acres, more or less; "*Glen Eyry*" four thousand six hundred and twenty-four acres;

and "*Muddy Creek*" five hundred and sixty-five acres, more or less; and the trusts are, that *Wayman* and his heirs may raise by a sale of the property as much money as will pay the debts for which he is liable as the surety of *Cunningham*, in the first place—then to reimburse him for such sums as he may advance for the said *Cunningham*—then to pay such other debts as the said *Wayman* may consider just and equitable—then to pay the expenses of the trust—and lastly, to pay over the surplus to the grantor, his heirs, executors or assigns.

Upon this bill, the Chancellor, on the 13th April, 1846, passed a decree, directing that the real estate of *James Cunningham*, deceased, in the proceedings mentioned, or so much thereof as may be necessary for the payment of his debts, be sold, and appointing *George Schley*, of *Washington* County, trustee, to make the sale. This decree is in common form, first requiring the trustee to give bond, and then to sell, after giving three weeks notice of the sale, as usual.

The trustee gave the prescribed bond, which is dated on the 29th April, 1846; but which was not filed and approved until the 7th of the then following July.

On the 17th June last, the trustee's report of his proceedings under the decree was filed. In this it is stated, that having bonded as required by the decree, and having advertised the said lands for sale as therein required, in two newspapers in *Cumberland*, one in *Hagerstown*, and one in *Baltimore*, he attended, pursuant to the notice, at *Cumberland*, on the 8th September, 1846, and offered the lands for sale; that he was then notified of a claim of title to "*Latent Worth*," growing out of a sale of the same by the collector; that the highest bid he could get for said tract was *five* cents per acre. For "*Glen Eyry*" but *six* cents was bid, and for "*Muddy Creek*" *twenty-six* cents per acre was the best bid, which bids the trustees refused to take, and consequently, no sale was made at that time.

That shortly afterwards, he re-advertised the land in the two *Cumberland* papers, to be sold at private sale, and although the advertisement had been continued from that period to the date

of the report, but one proposal had been made for a purchase, which the trustee accepted by entering into a written contract with the purchaser, filed with the report, from which it will appear that he had sold the right and estate of *James Cunningham*, deceased, in the lands, to *Jacob Markell*, for the gross sum of $3,000, to be paid in cash, upon the purchaser being notified by the trustee of the final ratification of the sale.

The trustee then proceeds to state in detail the reasons which induced him to sell so large a number of acres, for nominally so small a sum, which reasons were satisfactory to his mind, conducting him to the conclusion that he could not effect a better sale.

The trustee further states, that on the 22d December, 1846, the defendant, *Wayman*, wrote him, stating that he had received a letter from a certain *Duff Green*, of *Washington* City, enquiring about these lands, as he wished to purchase them for a Northern Company, and to know the lowest price for them; that *Wayman*, in answering the letter, had fixed the price at *fifty* cents, which he thought had better be taken, if such a sale could be made by the trustee or the writer; that the trustee replied, expressing his readiness to receive and consider any proposition for a purchase from said *Green*, and desiring *Wayman* so to say to *Green;* but from that time to the 24th May, 1847, nothing was heard from either *Wayman* or *Green*—that on that day, he received a letter from *Benja. E. Green*, marked T. R. No. 3, and filed with the report—and afterwards another letter from *Duff Green*, dated the 10th June, 1847, also filed, marked T. R. No. 4.

The agreement between the trustee and *Markell*, signed and sealed by them referred to, and filed with the report, is dated the *15th May*, 1847, and states that *Schley* agrees to sell to *Markell*, all the estate, right, title and interest of the said *James Cunningham*, deceased, of, in and to the said lands, viz: "*Glen Eyry*," "*Latent Worth*" and "*Muddy Creek*," for the sum of $3,000—the sale to be subject to the approval of the court, and the money to be be paid upon the ratification—the interest, right, title and estate of *Cunningham* to be conveyed

by the trustee upon the payment of the purchase money, as stipulated by *Markell;* and then by way of further description of the lands sold, and not as a guarantee of their area or contents, it is stated in the contract that they are supposed to contain the quantity of acres already mentioned.

In the trustee's advertisement of the public sale, to take place on the 8th September, 1846, he says, that by virtue of a decree of the High Court of Chancery of *Maryland*, I will offer at public sale in *Cumberland*, on Tuesday, the 8th September next, between the hours of 10 A. M. and 4 P. M. the following valuable real estate, (or so much thereof as may be necessary for the payment of debts,) of which *James Cunningham* died seized and possessed. The lands are then described as lying west of *Cumberland*, at no great distance from the *Western* or *National Road*, and form a portion of that country, usually styled "*The Glades*," and by their names and the number of acres already stated, as being contained in each tract.

Purchasers are then invited to call on *Mr. William Cunningham*, who is stated to reside thereon, who will shew the lands; and the terms of sale, as prescribed by the decree, are then given, to wit: one-third cash on the day of sale, or its ratification, and the residue in one and two years from the day of sale; and upon these terms, they are advertised to be sold.

This advertisement appeared for the first time in the *Hagerstown* paper, on the 10th August, 1846, and from thence it was copied into other papers, as therein directed.

In the advertisement of the private sale, which appeared in the *Cumberland* papers for the first time on the 10th November, 1846, the same description is given of the lands, and it corresponds, in all respects, with the previous advertisement, except that the trustee says he will offer the lands at private sale, having failed to sell at public sale.

On the 28th June, 1847, *Henry Wayman* and the heirs of *James Cunningham*, filed exceptions to the ratification of the sale reported by the trustee upon various grounds; and upon the same day an order was passed, fixing the first day of the

present month for the hearing. Upon notice being served upon the parties in interest and upon the trustee, the trustee and two of the parties, to wit: *Markell*, the purchaser, and *Francis Thomas*, who it appears was concerned in the purchase, have answered, and a correspondence, to some extent, between the several persons concerned, and the trustee, has been filed, and upon the said exceptions and answers, and this correspondence, the case has been argued. The letters are admitted to be genuine, and to have the same effect as if regularly proved under an order; but facts affirmed in these letters are not admitted by the purchasers, and are excepted to. It would occupy too much space to recapitulate the facts and averments contained in the answers to the exceptions and the correspondence. The Chancellor has read the papers with the utmost care, and will, in the observations he is about to make upon the exceptions to the sale, state the result to which his mind has been brought, by a deliberate consideration of the whole case.

The first objection taken to the sale is, that the public were not properly advised of the title in the property thus sold, which the trustee had the power to sell.

This objection rests upon the supposition, that the trustee should have stated in his advertisement the names of the parties to the suit in wnich the decree passed, and the several deeds creating incumbrances upon the property.

The decree, it will be recollected, directs that the real estate of *James Cunningham*, deceased, in the proceedings mentioned, or so much thereof as may be necessary to pay his debts, be sold. It does not say in terms, that the title of the parties to the suit shall be sold, though no doubt a sale under the decree would pass such title.

The language of the advertisement is:—

By virtue of a decree of the High Court of Chancery, there will be sold certain real estate, naming the tracts, and giving their locality, of which *James Cunningham* died seized and possessed. It does not say his title alone will be sold, but the lands of which he died seized and possessed. The public

was notified by this advertisement that these lands were to be sold under a Chancery decree, to which decree, of course, there must be parties; and I am of opinion, that in the absence of evidence, that competition in the purchase was prevented by the character of the advertisement, or that the sale was, in any respect prejudiced thereby. It seems to me it should not on this account be vacated. A reference to the Chancery proceedings, to which the public was directed, would have shown who were the parties, and what title was to be sold. The trustee's advertisement referred to the fountain of his authority—described the lands to be sold by name and locality, and gave such other information respecting them as would enable persons disposed to purchase to ascertain all that it was material they should be informed of.

The Chancellor does not think, from an examination of the forms of advertisements of Chancery sales usually employed, that such precision as is insisted upon by the counsel for the parties objecting to this sale, has been supposed to be necessary.

The second objection is, that the trustee did not, in fact, sell the interest of the parties to the suit, but only the interest and title of which *James Cunningham* died seized.

The purchasers, in their answers to these exceptions, take a different view of the matter; but conceding that this exception states truly the nature and extent of the interest purchased by *Markell*, still this seems to be an objection, which only the purchasers themselves could take, as they, and they alone, are injured by it. Besides, it may not be unworthy of remark, that the sale reported by the trustee disposed of precisely that interest in the lands of which *Cunningham* died seized; and the answer of *Wayman* to the bill under which they were sold states, "that he died seized in fee of the several tracts of lands named and described in the bill of complaint."

The third objection has reference to the cloud upon the title, which, it is supposed, might readily have been removed; but which the trustee was not in a condition to remove, by reason of his ignorance of facts, known to *Wayman*, one of the objectors.

This objection may, perhaps, be open to the observation, that if *Wayman* knew of any fact which would disperse the cloud which hung over the title, and omitted to communicate it to the trustee in due time, it does not become him, when a sale has been made, upon the ratification of which other parties interested in the proceeds are insisting, to interpose an objection upon that ground.

It is true that when a sale is objected to upon the ground of inadequacy of price, which inadequacy may be traced to doubts about the title, it becomes material to inquire whether the trustee might not, by reasonable efforts, have removed the cloud; and if the court can see that such efforts were not used, the question whether the sale shall, or shall not be ratified, may be affected by such neglect. *Glenn vs. Clapp*, 11 *Gill & Johns.* 1.

But from the very nature of the doubt about the title in this case, it was impossible that any diligence on the part of the trustee could remove it; the opinion of counsel might be taken upon the subject, but nothing short of the judgment of the court could solve the question.

It appears by the proceedings that the party who purchased for taxes, asserted, and was determined to maintain, the title thus acquired.

The fourth and fifth objections are based upon an alleged inadequacy of price, and upon negotiations carried on by *Mr. Wayman* for the sale of the property, which resulted as stated, in selling at a price much higher than the price obtained by the trustee; that inadequacy of price will not induce the court to vacate a sale, in other respects, unexceptionable, unless such inadequacy is so gross as to indicate a want of reasonable judgment and discretion in the trustee, was said by Court of Appeals in *Glenn vs. Clapp*, 11 *Gill & Johns.* 9.

It is material, therefore, to enquire whether the inadequacy of price in this case is so gross and palpable as to indicate a want of discretion and judgment on the part of the trustee. Looking to the bid made on the 8th September, 1846, when the lands were offered at public sale, as any criterion of the

price which could probably be obtained for them, and the sale reported surely cannot be condemned upon the grounds of inadequacy, since the sale reported is for a much larger sum than was offered at the public bidding.

But it is said, that although the price bid at the public offer of this property, was less than the sum which *Markell* and *Thomas* proposed to pay, yet the trustee had information that negotiations were pending, if not concluded, by *Wayman*, for a much larger sum,—and that under such circumstances, the trustee should have at least communicated with *Mr. Wayman* before he made a sale. The Chancellor thinks that the reasons assigned by the trustee for proceeding as he did, are satisfactory; and, indeed, *Mr. Wayman* himself confesses, that he, and not the trustee, was remiss in not giving information at the proper time; but is there any evidence that these lands are worth more, or that more could be obtained for them than *Markell* and *Thomas* have agreed to give? and emphatically, it may be asked, is there any evidence to show that a better price could have been had on the 15th May, 1847, the date of the sale?

The letter of *Duff Green* of the 19th August, 1847, with its conditions and qualifications, cannot be regarded as an offer; and yet it is the only one which has been made for the property, except such as may be found in the correspondence of the same party and his son with *Wayman;* and in the contract of the 9th June, 1847, between *Wayman* and *Green*, which besides containing stipulations which render it totally inadmissible, is, in effect, withdrawn by the letter of the 19th August last. In fact, though this property has been in the market, by advertisements in the newspapers, with very little intermission from August, 1846, to May, 1847, the offer of *Mr. Markell* is the only one to which any substantial character can be assigned, besides the almost nominal bid on the 8th September, 1846.

It is true *Mr. Wayman*, by a paper filed on the 7th instant, agrees to give $4,000 for the property, on the terms reported by the trustee; but this offer, in my opinion, cannot be allowed to have much weight in determining whether the property sold

previously at a price so much below its value, as to indicate a want of reasonable judgment in the trustee.

It is made after an event has happened, subsequent to the reported sale, which, in the opinion of many persons, has enhanced the value of the property. The Chancellor thinks as was said by the Court of Appeals in the case of *Tyson vs. Mickle*, 2 *Gill*, 384, that the validity or invalidity of the sale, must depend upon the state of circumstances existing at the time it was made. The clear equity of such a principle seems undeniable.

The sixth ground relied upon for not ratifying this sale is founded upon the manner in which it was made. It was a *private sale*, though the decree, which is in common form, directs a public one; for this deviation from the decree, it is supposed the sale must be condemned.

It is an admitted principle, that in sales made by the agency of trustees, acting under decrees of a Court of Chancery, the court is the contracting party on the one side, and the bidder on the other; the trustee being regarded as the mere agent or attorney of the court. I say this is the principle, though unlike all other contracts, one of the contracting parties is permitted to sit in judgment upon the contract, and pronounce upon its validity or invalidity. *Glenn vs. Clapp*, 11 *Gill & Johns.* 8. 2 *Bland*, 638, 639.

The principle, however, is understood to be incontestible, and as has been conceded in the argument. Chancellor *Hanson* has laid down the rule which should govern the court in deciding upon sales made under its authority. In the case of *Lawson vs. The State*, in 1804, he observed, "that reasons which would induce him, as proprietor or trustee, to set aside a sale made by his agent, should determine him, as Chancellor, to refuse his approbation to a sale made by a trustee.

It was decided by the late Chancellor, that if a trustee, directed to sell at public sale, does, notwithstanding, sell at private sale, the sale will be confirmed, if satisfactory reasons are given for doing so, and no objection is made. *Andrews vs. Scotton*, 2 *Bland*, 643.

The counsel by whom this case has been argued, have differed as to what was meant by the Chancellor when he speaks of no objection being made; but my impression is, that he must have meant objections of sufficient force to outweigh the reasons given by the trustee for deviating from the terms of the decree; and that he could not have intended that reasons which would be satisfactory to him, in the absence of objections, should be overborne by the mere unsupported veto of any one looking to the court as the vendor, and the trustee as its agent, acting according to the terms prescribed by the former. If, for reasons deemed sufficient by the court, the agent departs from the form in which he is to exercise his authority, who could have a right, merely upon the ground of such departure, to say that the principal should not ratify the act of its agent?

If the principle be sound, that the court is the vendor, and to be considered the proprietor of the thing to be sold, such a right of arbitrary interdiction on the part of any one cannot be maintained.

But it is to be recollected in this case, that the trustee did not undertake to sell these lands at private sale, until a fruitless effort had been made to dispose of them according to the terms of the decree; and that even after he had failed in this effort, they were constantly kept in the market by advertisements offering them at private sale. It is not the case, therefore, of a trustee who has undertaken to depart from the terms of the authority under which he acts, without first making an effort to comply with them, but it is the case of a deviation from those terms, after an ineffectual endeavor to conform to them. It is also a circumstance very material to be considered, that the price at which the trustee had contracted to sell these lands greatly exceeds the best offer he could get for them when exposed to public sale; and another very strong recommendation of the sale made is to be found in the circumstance, that the property was never withdrawn from the public eye, but kept always before it and in the market, by advertisements in the newspapers.

In *Tyson vs. Mickle*, 2 *Gill*, 383, a private sale made by a trustee, was confirmed by the court, though the amount of the private bid was considerably *less* than had been offered for the same property when exposed publicly; and the court in that case say, that Chancery will always ratify an act when done, which upon a previous application would have been authorized. It is true that in the case of *Tyson vs. Mickle*, the parties interested consented to the sale; but one of those parties, and one largely interested, was a minor, and therefore incompetent to consent. Adopting the principle of the Court of Appeals, that an act when done will be ratified, which the court, if applied to beforehand, would have authorized, I am of opinion, that the objection to the act of the trustee in this case, founded upon the form of the sale, cannot prevail; and it seems to me that upon an application, setting out all that had taken place prior to the sale to *Mr. Markell*, the trustee would have been authorized to accept his offer.

Whilst the Chancellor would consider it his duty to vacate sales made by officers of his appointment, under the influence of error, fraud, misrepresentation or injurious mistake, he nevertheless thinks that it would be a fatal policy to be astute in finding out objections to them. The impression of the court is, that they are entitled to the benefit of every fair and reasonable intendment,—and that a *bona fide* purchaser is not to lose the rights which he supposed he was acquiring when dealing with its agent upon objections founded upon the modal regulations of the sale—the non-observance of which is not shown to have been injurious. *Marshall's lessee vs. Greenfield*, 8 *Gill & Johns.* 349.

The 7th objection to the sale is because the trustee's bond is not upon stamped paper as required by the act of 1845, chap. 193. The law went into effect on the 1st May, 1846, and this bond, though dated on the 29th April, 1846, was not filed and approved by the Chancellor until the 7th July following.

The argument is, that the bond was of no effect until filed and approved; those acts constituting its delivery and acceptance.

By adverting to the terms of the decree, it will be found that the trustee is to proceed to make sale of the property, upon giving bond in a certain penalty, and with sureties to be approved by the Chancellor, conditioned for the faithful performance of the trust reposed in him by the decree.

This bond has been approved by the Chancellor, and it seems to me it would be of dangerous consequence to say, that although thus approved, the purchaser shall not get the benefit of his purchase, if the bond, for any reason, is defective.

Few persons, I presume, would be disposed to bid at trustees' sales, if such a doctrine is to obtain. The Chancellor, for this reason, does not deem it necessary to express an opinion upon the point discussed by the counsel; but upon application to require the trustee to execute another bond, he will be prepared to do so.

Upon the remaining objection, my opinion has been already expressed, and need not be repeated, and I conclude, therefore, *that the objections filed to the sale in this case must be overruled*, though in view of all the circumstances of the case, the order will direct that the parties pay their own costs respectively. I have arrived at this conclusion, after considering the case with much attention, aided by the very full and able arguments of the counsel employed in it. If my judgment is erroneous, I am gratified to know that a superior court will correct the error.

From this decree, *Henry Wayman*, *William C. Cunningham*, and *Charles E. Cunningham* appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence, Magruder and Martin, J.

By Alex. Randall and Nelson for the appellants, and

By Alexander and F. A. Schley for the appellees.

By the court:

Decree of the Chancellor affirmed for the reasons stated by him.

DECREE AFFIRMED.

SYLVESTER COSTIGAN AND SUSAN R. HIS WIFE AND OTHERS *vs.* ROBERT SEWALL.—*December*, 1847.

S. agreed to sell *D.* certain lands in *Maryland*. *D.* agreed to give $9,000 for the same, payable in an order on *V.* now in *Mississippi*, to pay him (*S.*) the said amount, by either buying the negroes of *D.* himself, now in his (*V's*) possession, or selling to an amount equal to that sum, or selling such thereof as *V.* can best spare on a credit, if most conducive to *D's* interest, and pass the notes received therefor to *S.* adding to the same the discount thereon, so as to make it equal to $9,000 cash. Upon the receipt of the said notes, *S.* to convey to *D.* *S.* afterwards purchased of *D's* agent certain of the slaves, for $4,655 55 in *Mis:* bank paper, which was, in fact, of less value than par; and also received a note from her agent, payable in the same bank paper, of less value than par. *Held:*

1st. There was nothing in the contract which indicated that *D.* was to allow any discount to *S.* except on credit notes taken on the sales of the slaves, and that discount was nothing more than interest on such notes during the periods of their delayed payments.

2d. If *S.* agreed to receive the bank notes in payment of his claim, without any understanding with *D.* that a discount should be allowed him, he receives such notes as a substitute for specie, and they are a payment for their nominal value.

3d. This contract does not require the consideration to be paid in *Mississippi*, or in any particular place. This mode of payment was for the benefit of the vendee.

4th. If the agent in *Mis:* had agreed to purchase the negroes, as provided for by the contract; or, if they had been in *Mis:* sold to a resident of any other State in the *Union*, and the note for the purchase money had been accepted by *S. for delay of payment*, it would have borne the rate of interest of *Mis:*—that being the place of the contract.

5th. The contract in this case does not specify any place of payment. It is, therefore, to be considered as a contract to be enforced in *Maryland*, and liable to the rate of interest here.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 4th November, 1840, by the appellee, and alleged that on the 29th September, 1836, he entered into an agreement with *Susan R. Dorsey*, (now *Costigan*,) for the sale of certain lands, and crops growing thereon, except fodder, for $9,000, payable in an order on *Vernon Dorsey*, of *Mississippi*, to pay the appellee the amount, by either buying himself negroes of the said *Susan*, now

in said *Vernon's* possession, or selling to an amount equal to that sum; or selling such thereof as he can best spare, on a credit, if most conducive to her interest, and pass the notes received therefor to the said *Sewall*, adding to the same the discount thereon, so as to make it equal to $9,000 cash; the said sale and instructions to be consummated as soon as his crop of cotton is secured, or at an earlier day, if the said *Vernon Dorsey* and the said *Sewall* shall deem it most convenient, with a due regard to a fair sale; and upon receipt of the said notes, the said *Sewall* will direct a letter to his agent to deliver a deed to the said *Susan*. This contract was accompanied with a letter from the said *Susan* to her brother, *Vernon Dorsey*, to carry the same into effect. The bill then alleged *Vernon's* refusal, from that to the time of his death, to execute the contract; that in the month of April, 1838, the appellee purchased from *W. H. Lake*, agent of *Susan*, for the purpose of said contract, certain slaves of the said *Susan*, for the sum of $4,655 55, in *Mississippi* bank paper, which was of the value of $3,724 44, legal currency; that about the same time he received from the agent of the said *Susan* the note or obligation of *Puckett & Lake*, for the sum of $3,100, payable in *Mississippi* bank paper, which was equal in value and realized to the appellee no more than the sum of $2,480 in legal currency, and that the aforesaid payments are the only ones he has received. The bill alleged that inasmuch as the aforesaid payments were to have been made in *Mississippi*, he is entitled to interest for default in payment there, according to the rate of interest usually chargeable in said State, which is after the rate of *nine per centum*, so that there will now remain due to appellee $4,500 of purchase money, &c.

The answer of *Costigan* and wife admitted the contract with appellee, the instructions given to *V. D.* and his refusal to execute the same; the sale of a part of said *Susan's* negroes; that complainant was a purchaser thereof; it then denied all liability for difference in value between *Mississippi* bank paper and legal currency, and alleged that the rights of the parties were to be adjusted according to the true spirit of the original

contract. The answer set up other defences not adjudged by this court.

Some proof was taken which is adverted to in the opinion of this court, and the cause was referred to the auditor to state accounts between the parties.

That officer reported two accounts.

In account A, he allowed only the credits mentioned in the bill of complaint, as none other had been proved; and the discount there claimed for the bank paper, in which the several sums of money constituting those credits were received is less than that proved.

In account B, the auditor made a statement of complainant's claim, rating the discount at the average of the testimony in relation to the several kinds of *Mississippi* bank paper—it not appearing in what kinds the payments were made—by which it appears that the claim stated in the bill is less than that established by the proof by $876. As the contract was to be executed in *Mississippi*, the auditor charged interest at *eight* per centum, the rate allowed in that State, as appears by the proof.

After exceptions, the Chancellor (BLAND) confirmed account A, and the defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By R. JOHNSON and MAYER for the appellants, and

By ALEXANDER and CAUSIN for the appellees.

DORSEY, J., delivered the opinion of this court.

The first question to be determined is, whether the payments made to the appellee are to be credited at their nominal amount, or for such sum as that amount of *Mississippi* bank notes would have purchased in specie.

There is nothing in the contract between the parties which indicates an understanding between them, that *Susan R. Dorsey* was to allow any discount to the appellee, except on credit notes, taken on the sales of her negroes; and that

discount was nothing more than interest on such notes during the periods of their delayed payments. If then the appellee agreed to receive *Mississippi* bank notes in payment of his claim, without any understanding, express or implied, between him and his debtor, that a discount should be allowed him, he receives such notes as a substitute for specie; and they are a payment for their nominal value. He was not bound under his contract to accept of any notes taken for negroes sold, unless their payment could have been enforced in specie. And the proof shows that he was perfectly aware of his rights at the time he assented to receive the payments in *Mississippi* bank notes, or their equivalent in negroes. He is therefore entitled to no allowance for the depreciation of such bank paper, and in making such discount the auditor's account is erroneous.

The only remaining question is, should interest on the $9,000 be calculated according to the rate of interest payable in *Mississippi* or in *Maryland?* The contract was made in *Maryland*, and shows that *Robert Sewall*, was a resident thereof, as was *Susan R. Dorsey*. There is nothing in the contract to excite even a suspicion that the stipulation, as to the mode of payment, was designed for the benefit or convenience of any body, except *Susan R. Dorsey*. It does not, as has been asserted, require the $9,000 to be paid in *Mississippi*, or in any particular place. If *Vernon H. Dorsey* had agreed to purchase the negroes as provided for by the contract, or if they had been in *Mississippi*, sold to a resident of any other State in the Union, and the note for the purchase money had been accepted by *Sewall* for delay of payment, it would have borne the rate of interest of *Mississippi*, that being the *loci contractus*. But it would not thence have followed that it was payable there. A demand or tender of payment might be lawfully made in any part of the world, wherever the plaintiff and defendant might be. Neither the note thus taken, nor the contract before us, specifies any "*locus solvendi*." Upon the refusal of *Vernon H. Dorsey* to obey the directions of his sister, a right of action accrued to *Robert*

Sewall against her. She became responsible for the breach of a *Maryland* contract—was chargeable with interest accordingly,—and no subsequent payments made to *Robert Sewall* in *Mississippi*, can, in any wise, change the principles of her responsibilities to him. It follows, therefore, that on this ground also, the Chancellor erred in overruling the appellant's exceptions to the auditor's report, and in re-affirming, by his order of the 11th October, 1845, his order of the 29th July, of the same year.

This court will sign a decree reversing the orders of the Chancellor, appealed from, and remanding the cause to the Court of Chancery for further proceedings therein, &c.

DECREE REVERSED AND CAUSE REMANDED.

MENDEZ I. COHEN *vs.* JAMES V. WAGNER.—*December*, 1847.

If a party interested in real property, decreed to be sold by a trustee of the Court of Chancery, should apply to such trustee to know at what sum he intended limiting the sale, and was informed,—and if a few minutes before the sale, the trustee were to inform such party that his limit was several thousand dollars less, and in consequence thereof, the interest of such party had been prejudiced, the court would not ratify a sale at such lesser sum.

Where property was offered for sale under a decree on a *Saturday*, the *Sabbath* of a party interested, and who was prevented thereby from making arrangements to purchase the same, and he knew of the day fixed for sale several weeks before it took place, it was his duty to have applied to the trustee to change the day. Omitting to do this, his failure must be regarded as a waiver of all objection to the day of sale as being his *Sabbath*, and he must abide the consequences of his own omission.

The practice of opening the biddings upon a Chancery sale upon a mere offering of an advance upon the purchaser's bid, has not been adopted in this State.

Mere inadequacy of price in a Chancery sale correctly conducted, is not, of itself, sufficient ground for vacating the sale.

A fair sale of property for $13,000, alleged to be well worth $15,000 or $20,000, will be ratified. There was proof, however, in this case that extensive repairs were necessary to place the houses in good condition.

A sale made in conformity to the decree will not be set aside, or its ratification

refused for mere inadequacy of price, unless the court believe that such inadequacy was the result of fraud, surprise, mistake, or unfairness in the sale.

Inadequacy of price is, for the most part, regarded as the inducement to the action of the court, after the establishment of a cause deemed sufficient to warrant its nullifying interposition.

Where a stranger called on the trustee of a court about to offer property at public sale, and inquired what was his limit of sale, and was informed from $12,000 to $15,000, and the stranger said he would give $13,000, or find a purchaser at that sum; and the auctioneer, the agent of the trustee, casually heard in a conversation between by-standers, that either *W.* or the trustee, remarked that *W.* would give $13,000 for the property. The auctioneer then said to his clerk, who was in fact conducting the biddings, "*you have a bid of* $13,000"—the purchaser's name not being announced—and the clerk, after crying the property for some time, receiving no advance upon the bid from the company assembled, struck off the property to *W.* who agreed thereto. *Held*, that whether the bid was made by *W.* or by some other person acting for him, was immaterial. It is not necessary or usual to announce the name of the bidder, nor is it necessary to be known.

A communication of the trustee's limit as to price, made by him to the auctioneer employed to make a sale, and if he got no bid above that, to strike it off to *W.* is no objection to a sale. It does not prevent any person from bidding a larger amount, and such a course does not make it a private sale—but in form and substance, it is a public sale.

Inadequacy of price may be so gross and inordinate as to furnish evidence of fraud or misconduct in a trustee, such as would vitiate his sale.

APPEAL from the Court of Chancery.

This cause was before this court at this term (*ante* 97) in another form; the statements there reported constitute a part of this, and with the additional statements contained in the opinion of the judge of this court, show the grounds upon which the appellant excepted to the final ratification of the sale to the appellee.

In support and denial of the exceptions to the ratification of the reported sale, the following depositions were taken—much of the proof not being considered material by the reporter, is however omitted.

Jabez M. Gill, on the part of the exceptant, deposes: that he knows the property called the *Holliday Street Theatre*—has known it for some years; several years ago he was in it, frequently did repairs for four years; deponent is a carpenter, a master builder, a competent judge of property in *Baltimore*.

The ground on which the *Theatre* is built, is worth $150 per foot, independently of the buildings erected on it; the structures on it are worth from $17,000 to $18,000, including the scenery and fixtures.

(Cross-examined.) He does not know the present condition of the *Theatre.*

Francis Meyer, on the part of exceptant, says: that he knows the *Holliday Street Theatre*—believes that $20,000 is a fair price for it; it would bring the interest of that amount if the affairs were well administered; deponent was at the sale of the property at the *Exchange*, on June 20th, 1846; he heard $13,000 cried by the auctioneer; there was no advance on that—the auctioneer cried it a long time at that amount, and there was no further bid.

(Cross-examined.) Deponent is a large stockholder in *Front Street Theatre*—he has not received one cent of interest on his investment since 1837.

Joseph Green, on the part of the exceptant, deposes: that he knows the *Holliday Street Theatre*—has known it since 1830; deponent has confidence in his judgment of the value of property in *Baltimore*; thinks the value of the *Holliday Street Theatre*, excepting scenery and decorations, is $15,000; the value of the scenery and decorations in connection with the *Theatre*, if the present manager conducts the *Theatre*, is $1,000; if he should not conduct it, the value would be about $50; knows nothing of the value of property on *Holliday Street;* it is the prettiest little *Theatre* in the *United States;* it is the best *Theatre* for sound; it is one of the very best *Theatres* for its size in the *United States;* it has a good location—the building is not in good order; deponent was treasurer of the *Theatre* from 1834 to 1837; during that time the *Theatre* was respectively under the management of the following persons, &c. Theatrical property has been very much depressed every where for the last ten years. Deponent was present at the sale of the *Holliday Street Theatre;* he did not see *Mr. Cohen* there—he might have been there; the auctioneer *cried the bid for some length of time* before he struck the

property off; when the deponent went to the sale he had no idea of bidding, but if he had seen two friends, whom he has since seen, he would have bid for the property.

George W. Porter, on the part of the exceptant, deposes: that he is the superintendent of the *Reading Room* at the *Exchange*—was present at the sale of the *Holliday Street Theatre*, on June 20th, 1846. It was deponent's place to be present at the sale, and ascertain whether a sale had been made—deponent derived his information as to sales from the auctioneer—deponent doubted from what had transpired at the sale, whether the sale was a *bona fide* one. The property was set up in a formal manner, as is usual on real sales. *Cannon, Bennett & Co.* acted as auctioneers—*Mr. Bennett* was crier. *Mr. Cannon* made a bid of $13,000, which was the only bid made—the bid was dwelt on for several minutes; in consequence of the manner of the sale, deponent doubted whether it was a real sale; it is not usual for auctioneers to make the first bid. When the property was knocked down, supposing that it was not a real sale, deponent applied to *Mr. Cannon* for information on the subject. *Mr. Cannon* stated that he was not certain, but that deponent should make the charge for the use of the room, and if it turned out otherwise, the matter would be corrected. *Mr. Cannon* further stated, that he was instructed to bid $13,000—to dwell upon it, and if no advance was made, to knock it down to *Mr. James V. Wagner.*

(Cross-examined:) Mr. Cohen was present at the sale. If any person had chosen to bid above $13,000, they had ample time to do so. The moment the property was struck off, *Mr. Wagner's* name was announced as the purchaser.

George Brown, produced on the part of the exceptant, deposes and says: that he knows the *Holliday Street Theatre; he* has known that property since 1805; his dwelling is in the same street, nearly opposite. The value of the property is difficult to ascertain, the location not being desirable to some persons. Deponent was present at the sale of the *Theatre*—he went from curiosity—supposed that the property might bring $15,000.

(Cross-examined.) When the property was knocked off, deponent took it for granted that it was a sale—he did not know who made the bid. Deponent was asked by a friend why he did not purchase the property, as the price was a low one; deponent answered, that if he had known it was going at $13,000, he might have bought it.

Robert Carey Long, on the part of the exceptant, deposes: that his profession is that of an architect. He knows the *Holliday Street Theatre*—has been in it and examined it professionally. From the size of the lot, and the character of the buildings, deponent's impression was, that the property was worth at least $20,000. That impression was founded on the size of the lot and the condition of the buildings. When deponent saw the property advertised, his expectation was that it would bring at least $20,000.

William C. Conine, produced on the part of the exceptant, affirmed: that he was present at the sale of the *Holliday Street Theatre*, in June, 1846, from the time the bidding commenced until the property was knocked down. Deponent heard *Mr. Cannon* say that he was authorized to make a bid of $13,000. Deponent does not mean to say, that he is certain that he heard *Mr. Cannon* say he was authorized to bid $13,000, but that *Mr. Cannon* bid $13,000, and deponent inferred that he, *Mr. Cannon*, was authorized to make the bid. It is a common case for auctioneers to start property by making a bid. His idea was that the bid was for the purpose of settling up the matter among the proprietors. Deponent thinks he saw *Mr. Wagner* at the sale—did not see him bid or authorize a bid. The property was cried for a short time, deponent does not know how long, but for a few minutes. Before *Mr. Wagner* left the room, it was understood that *Mr. Wagner* was the purchaser. The property was not cried the usual length of time, for property of the value of the *Holliday Street Theatre;* there was no competition—the property was knocked down very soon. Deponent does not know the value of such property—he cannot say that it was cheap—thought at the time it was cheap.

John B. Cannon, produced on the part of *James V. Wagner*, deposes and says: that *Cannon, Bennett & Co.* were the auctioneers of the sale of the *Holliday Street Theatre*, at the sale of June 20th, at the *Exchange*. Deponent was not employed by *Mr. Wagner* in any manner or shape to purchase the *Theatre*. Previously to the sale, deponent was walking about listening to the conversation between the by-standers, in the course of which either *Mr. Wagner* or the trustee, remarked that *Mr. Wagner* would give $13,000 for the property. *Mr. Bennett* announced the sale as a free and peremptory sale; read the advertisement, and asked for a bid several times: no one bid at first. Deponent, who was standing out, remarked "you have a bid of $13,000;" after that, *Mr. Bennett* cried the property as long as usual; deponent went to the stand; *Mr. Bennett* asked whose bid it was? Deponent privately stated to *Mr. Bennett* that it was *Mr. Wagner's* bid. *Mr. Bennett* dwelt upon the bid a long time, as long as if he had been selling *Barnum's Hotel*. Deponent has sold a very large amount of real estate in the City of *Baltimore*. *Mr. Bennett* dwelt longer on the bid than deponent would have done by some time. Deponent being asked by the solicitor for the exceptant, how long the property was cried, answers that he cannot specify the length of time;—being asked if it was ten minutes, answers that he cannot say;—being asked if it was five minutes, answers that he cannot say.

(Cross-examined.) Deponent was not authorized by any one to make a bid; he merely heard that *Mr. Wagner* would give $13,000, and made the offer himself. When he mentioned to *Mr. Bennett* that he had a bid of $13,000, he, deponent, did not say he was authorized to offer that sum. Prior to the sale, when deponent asked *Mr. Latrobe* what price was expected, he said he did not know—the highest price that could be got for it; that the property was to be sold.

Peter Barger, produced on the part of *James V. Wagner*, deposes: that he has been engaged in building and affairs connected with property in the City of *Baltimore* for thirty years; has considerable knowledge of the value of property

in the City of *Baltimore*, and knows the *Holliday Street Theatre* and lot. If deponent could see his way clear, he would give $12,000 for the *Holliday Street Theatre* and lot.

(Cross-examined.) In estimating the *Holliday Street Theatre* property, and expressing his willingness to give $12,000 for it, he predicates his opinion on the basis that real estate ought to yield ten per cent. on the amount of the investments.

The witness being asked by the solicitor for the exceptant what property would be worth, provided it would bring regularly an annual rent of $1,000, and besides that, a revenue of $1,260 for free tickets to be sold by the proprietors, and $340 as rent for the bars—received by the proprietors in addition to the above sums, and also the reserved right of an entire stage-box—what then would deponent consider the value of the property? To which he answered, that if he had a guarantee of such a revenue, his estimate of the value of the property would be accordingly. The value of the property where the *Theatre* stands—there being no alley in the rear—is not more than from $4 50 to $5 per front foot on lease. The walls of the *Theatre* building are substantial; the roof leaks, and is defective; the staging is also defective.

Joseph Robinson, produced on the part of the exceptant, deposes: that he knows the *Holliday Street Theatre*—has known it ever since it was built. In 1839 or 1840, it was offered for sale by *Mr. Latrobe* at the *Exchange*. Deponent was authorized by a chartered company to bid $25,000 for it; he did not bid, but authorized *Mr. Joshua Dorsey*, by written authority, to bid that amount. *Mr. Dorsey* bid $25,000, and a few hundred over by deponent's authority. The property was then bid in at a price beyond *Mr. Dorsey's* bid, and *Mr. Latrobe* informed defendant that it was bid in; that it did not go to the limits. Deponent thought that the *Holliday Street Theatre* would bring $15,000 at the sale; has sold a large mass of proprietor's tickets; the price depended on the season and the management. When *Mr. Maywood* was manager of the *Holliday Street Theatre*, he bought up eighty or ninety of the season tickets at $12 per annum; at that time the price

of box tickets was $1—of pit tickets, fifty cents each; at present the price of box tickets is fifty cents—of pit tickets, twenty-five cents each; last fall deponent sold one season ticket for *Randall H. Moale, Esq.* for $8; he might have sold more, but does not recollect them; that season was from early in September to the 1st of January. Deponent always sold *Mr. Benjamin I. Cohen's* tickets for from $3 50 to $10 per annum.

(Cross-examined.) Theatricals for the last fifteen years have been at a very low ebb in *Baltimore*—the managers generally failed. No rent was received from *Burton*, and but little from *Ward*. Even when the trustees received no rent, the proprietors nevertheless used their season tickets.

James Gifford, produced on the part of *James V. Wagner*, deposes: that he is well acquainted with the *Holliday Street Theatre;* he took charge of the house in the year 1840. The house is in a very bad condition, &c.; he thinks it will require from $6,000 to $7,000 to put the *Theatre*, within the four walls, in complete order. In making his estimate, when deponent speaks of the expense necessary to put the *Theatre* in order, he merely means what would be necessary to take out the part which is decayed and renew it. Deponent being asked by the solicitor for the exceptant for a specification of the items of his estimate, says that he has no estimate of the items. Deponent shored up the stage last winter, and believed at the time that if the stage had not been shored, it would have fallen; the side which was shored about four or five years ago is now settling; the stage cannot be used to work the machinery without shoring; the machinery cannot be properly worked by shoring the stage.

(Cross-examined.) The *Theatre* is now in use; the stage is used—the machinery is used; as a make-shift, the scenery is used; the houses are tolerably fair; the last night was a fair night; the night previous the house was very well filled; the three nights preceding the injunction were all fair houses. Deponent has done all the carpenter's work of the *Theatre;*

cannot tell the amount of his bill for any of the three years past.

Jacob I. Cohen, Jr. produced on the part of the exceptant, deposes: That he was present at the sale of the *Holliday Street Theatre*, on June 20th, 1844. Deponent answered that he did not suppose the property would be sold at that time, from what he had heard before the day of sale, and his observations after he entered the *Exchange* before the sale. By his expressions of what he had heard before the day of sale, he refers to a conversation which he had with *Mr. Latrobe*, the trustee.

Some days before the sale, deponent called on *Mr. Latrobe*, to obtain information in relation to a claim which deponent had as a stockholder. Among other matters, deponent inquired of *Mr. Latrobe* as to the probable price which the *Theatre* might bring, and whether he would limit the price; deponent and *Mr. Latrobe* spoke of the former occasion, when the *Theatre* had been knocked off for $20,000. It was a matter of doubt with both *Mr. Latrobe* and the deponent, whether the *Theatre* would bring $20,000 at this time. Deponent enquired of *Mr. Latrobe* if he intended to fix any limit under which the *Theatre* would not be sold? He, *Mr. Latrobe*, said no; that he had not fixed any price, but would be governed by that discretion which trustees generally exercise in relation to property in their hands; that he would make up his mind between that time and the time of sale, as to the price. He seemed to settle down, so far as deponent could judge, at $15,000 as the price which the *Theatre* should bring at the time. *Mr. Latrobe* remarked, that although it might not bring $15,000 at this time, at some future time it might bring a less amount; if so, he would consider himself justified in accepting a less sum than $15,000, after having exercised the discretion which he thought he might use in relation to the matter. Deponent parted from *Mr. Latrobe* under the conviction that he would not sell the property for less than $15,000 on the day of sale; that conviction was produced by *Mr. Latrobe's* remarks during this conversation. Deponent attended the sale, which took

place some twelve or fifteen days after the above conversation, under the conviction arising from this previous conversation with *Mr. Latrobe*, that the property would not be sold for a less sum than $15,000. From the small number of persons attending, the character of the persons attending, and the other circumstances, deponent supposed that there would be no sale. Deponent saw *Mr. Wagner* at the sale, did not suppose that he was interested in the sale, as he was not a stockholder. The crier read off the advertisement, and was then ready for a bid. *Mr. Cannon* then bid $13,000; the bid was cried the usual time and in the usual manner; there was no other bid given and the property was knocked off; the offering did not occupy a long time; about the time the bid was closed a few other persons came into the Rotunda; after the property was knocked down, deponent on retiring, enquired of *Mr. Cannon* if the property was sold, he said he did not know, that he had made the bid for *Mr. Wagner*. After the conversation which deponent had with *Mr. Latrobe*, deponent was firmly under the impression that the *Theatre* would not be sold at a price under $15,000. Deponent and his brother, *Mendez Cohen*, went together to the *Exchange* to the sale. In going down he remarked to his brother that he did not think there would be any sale—not that he supposed the *Theatre* would not bring over $15,000, but that he thought some arrangement would have been made to supersede the necessity of a sale.

When the property was cried at $13,000, deponent did not suppose it was a real bid, but thought it was one such as auctioneers generally make to start property; he would have gone from the *Exchange* under the impression that the property was not sold, if he had not made the enquiry of *Mr. Cannon*, and received the answer which he has above stated.

The sale was on Saturday, a day on which neither deponent or his brother transacted any business. If *Mr. Mendez Cohen* had been disposed to purchase the property, his ability to purchase it at $15,000, or over, is ample.

Deponent knows the *Holliday Street Theatre*, he has known it for a long time; his estimate of its value would depend on

circumstances; for instance, some persons might be disposed to purchase a *Theatre*, some might not. In the hands of a prudent person, capable of managing the property, it would be low at $15,000; deponent thinks that the trustee, under the circumstances of the case, would have been justified in selling at that price; deponent was formerly owner of a share in the stock of the *Theatre;* he was not in the habit of selling season tickets, but did so once or twice; he sold one some time last year for the season at $8; that season did not embrace a whole year, there are several seasons in the year.

On being interrogated by the solicitor for *Mr. Wagner*, deponent answered that he saw *Mr. Wagner*, *Mr. Conine*, *Mr. Glenn*, *Mr. Brune*, and *Mr. George Brown* at the sale; he supposes that either of those gentlemen was amply competent to purchase. *Mr. Brown* lives nearly opposite the *Theatre*, and is one of our wealthiest citizens.

(Cross-examined.) Deponent did not announce at the sale to any person that there was a limit put on the *Theatre;* he did not communicate to any of the above named persons that the property would not be sold under $15,000. On offering the property the auctioneer read the advertisement, which stated that the sale would be peremptory. The auctioneer did not say, so far as deponent heard, that he had a bid, and the sale would be positive. If deponent had heard any thing of that kind, he does not think that he would have asked *Mr. Cannon* if the property had been sold.

During the time that deponent and his brothers were engaged in banking, their bank was open on Saturday to receive deposits and pay checks. In any matter which concerns the public, and not himself, deponent feels it his duty to attend to business of that character.

Deponent does not know that his brother ever asked him to contribute towards the expenses of this proceeding. If his brother called on him, he would feel himself bound to contribute. Deponent does not know of any contributions of $2 towards defraying the expenses of these proceedings. His brother, *Mendez Cohen*, and himself reside together—but

they have never had any conversation as to the manner in which the expenses of the exceptions are to be borne.

A great part of the shares of stock now held by *Mr. Mendez Cohen*, were formerly the property of *J. I. Cohen, Jr. & Brothers*. *Mr. Mendez Cohen* paid for them at the rate of $150 per share. Deponent has now no interest in the *Theatre*, having disposed of the only share which he held, for the purpose of becoming a witness in this case—understanding that course was necessary for that purpose. He was not aware of any meeting of stockholders—nor was he aware that any meeting of the stockholders was held, at which it was resolved that the *Theatre* should be limited at $15,000; nor did he communicate such a fact to *Mr. Latrobe*. Deponent was not aware of any meeting of stockholders. Neither deponent, or his brother, instructed *Mr. Latrobe* to limit the price of the *Theatre* at $15,000.

John H. B. Latrobe, produced by *James V. Wagner*, deposes: That he had one or two conversations with *Mr. Mendez Cohen*, and one conversation with *Mr. J. I. Cohen, Jr.* prior to the day of sale, at the office of deponent. Both of these gentlemen enquired as to the limit of the price of the *Theatre*, and whether deponent had fixed one: and to both of these gentlemen, deponent said explicitly and emphatically that he had fixed no limit, but would make enquiries on the subject, and would fix a limit before the day of sale, &c. &c.

From the day of deponent's interview with *Mr. Cohen* to the day of sale, deponent has no recollection of having seen him; saw him on the day of sale, but had no conversation with him. Deponent has no recollection of *Mr. Cohen* objecting, during the interview, to the sale having been fixed on Saturday. Deponent fixed on the day without reference to *Mr. Cohen*, and would have fixed on any other day if it had occurred to him, and *Mr. Cohen* had requested it, as a matter of courtesy to a gentleman interested in the matter. On the day of sale, *Mr. Mendez Cohen* mentioned to deponent that it was the *Jewish Sabbath*, which was the first time that it occurred to him, as he now recollects.

On the day of the sale of June 20th, 1846, at the *Exchange*, deponent took a seat for a few moments at the side of *Mr. Mendez Cohen*. A very short time before the sale, he asked deponent what was the limit. Deponent replied $13,000. *Mr. Mendez Cohen* expressed his strong dissatisfaction. Deponent suggested to him that he should bid himself, as a mode of *protecting* his interests. He said that was his Sabbath, and he could not do so. Deponent then replied that there were persons present who would do it for him, which *Mr. Cohen* said he could not do it—deponent understanding *Mr. Cohen* to decline doing by another what he could not personally do.

The auctioneer soon after commenced crying the property. Deponent's impression is that the auctioneer said that the property was fairly in the market; but does not recollect his saying that there was a real bid.

Deponent being asked by the solicitor for exceptants, what interviews he had with *Mr. Mendez Cohen*, referred to in his answer, says that he had a conversation with *Mr. M. Cohen* in the court-room—he being then on the jury—and is under the impression that he had another at his, deponent's office, although about this is not certain.

The purport of these conversations was to ascertain if deponent had fixed a limit for the price; in which he stated that he had fixed no limit, but would make enquiries, and do so before the day of sale. In the course of that conversation, deponent may have said that he would see some of the stockholders on the subject, but he has no recollection of having said so.

The only conversation deponent had with *Mr. Glenn* was on the day of sale at deponent's office, a few hours before the sale, and at the place of sale, as mentioned in deponent's answer to the exceptions in this cause.

When *Mr. Glenn* called on deponent at his office, he asked him what was his limit of sale; deponent's answer was, as made in his answer to the exceptions, from $12,000 to $15,000. *Mr. Glenn* then said that he would give $13,000 for the property. Deponent is not certain whether *Mr. Glenn* said that

he would give or find a purchaser at $13,000. This conversation was a brief one. And the next time deponent saw *Mr. Glenn* was at the place of sale. Deponent did not regard the price bid by *Mr. Benjamin I. Cohen*, at the sale in 1842, as fixing any value on the property. He thought it an arrangement among the parties interested.

Francis Bennett, produced on the part of *James V. Wagner*, deposes: that he is one of the firm of *Cannon, Bennett & Co.* Deponent is the auctioneer who sold the *Holliday Street Theatre*. At the sale of June 20th, 1846, there was a respectable company present. The property was set up, and announced to be a peremptory sale—read so from the advertisement, which was headed peremptory sale; deponent also named several different times before he knocked the property off, that it would be a peremptory sale; that he had an actual bid, and the property would be sold, without reserve, if there was not another dollar bid upon it.

Deponent dwelt on the bid longer than usual—much longer than he has frequently done in selling large pieces of property;—he was informed that the bid was *Mr. Wagner's* before he first cried it.

(Cross-examined.) *Mr. Cannon* informed him before he cried it that it was *Mr. Wagner's* bid. *Mr. Cannon* was standing in front of the stand—stated to deponent that *Mr. Wagner* bid $13,000; this was directly after deponent read the advertisement. *Mr. Cannon* said in a tone of voice, sufficiently loud for the auditory to hear him, that it was *Mr. Wagner's* bid. There being but one bid on the property, deponent cried it much longer than if there had been three or four bids. *Mr. Wagner* himself made no bid. *Mr. Latrobe* informed deponent that it was to be a peremptory sale. Deponent heard no bid, except *Mr. Cannon's*.

The estimate of necessary repairs on the *Theatre* was $4,331.

After these depositions had been taken, the appellant, by his petition, offered to take the property at $15,000,—and if the sale should be set aside, he offered to start the bidding at that

sum,—and if the property should be struck off to him at that price, to pay all expenses incident to a *second* sale,—and if a deposit is required, he is ready to make the same.

On the 9th November, 1846, the Chancellor (BLAND) overruled the exceptions and ratified the sale, with costs: from which order *Mendez I. Cohen* appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By W. SCHLEY and NELSON for the appellant, and

By REVERDY JOHNSON and MCMAHON for the appellee.

DORSEY, J., delivered the opinion of this court.

Had the proof sustained that part of the exceptant's first exception, which alleges that the said *Mendez I. Cohen*, being a stockholder, and interested in the proceeds of said property, after the sale was advertised by the said trustee, and about two or three weeks before the sale, applied to the said *J. H. B. Latrobe* to know at what sum he intended limiting the price of the sale of the said *Theatre* and property, and was informed $20,000; that a few minutes before the sale, the said *Latrobe* informed the said *Cohen* that his limit was $12,500, and that in consequence thereof his interests in the sale had been prejudiced, such an objection to the ratification of the sale could not have been successfully resisted. But the allegations thus made, being wholly disproved by the testimony in the cause, the validity of the sale stands unaffected by it.

The second ground assigned in the first exception against the ratification of the sale is, "that the day of sale was Saturday, the Sabbath of the said *Cohen*, who was thereby prevented from making arrangements to purchase said property," as he could not make the purchase on his Sabbath day, or so endeavor as to prevent a sacrifice of said property. Conceding (for the mere purpose of considering it) the sufficiency of this objection, if made in the proper time and manner, let us enquire whether, under the circumstances in proof in this case,

it ought to avail the exceptant. It can derive no support from the allegation preceding it, that two or three weeks before the sale, the trustee informed the exceptant that the limit at which he would sell the property at the approaching sale was $20,000, because the fact of such information has, as above stated, been disproved. Was it made at the proper time?—is then the first inquiry. The exceptant knew the day fixed for the sale for weeks before it took place, and also, that the trustee would fix no limitation as to the price, until the day of sale. If then, the day of sale being his Sabbath, subjected him to the consequences he in his exception ascribes to it, he ought, with all convenient speed, after the day of sale became known to him, to have applied to the trustee to change the day, and apprised him of the grounds of his application. His failure to do this must be regarded as a waiver of all objection to the day of sale, as being a *Jewish* Sabbath; and he must abide the consequences of his own omission.

Under the first exception, a third ground is relied on for withholding the ratification of the sale for $13,000, of property alleged to be "well worth $15,000 or $20,000, or more."

From the views entertained of the effect which would result from the asserted inadequacy of the price, if it, in truth, existed, it is deemed unnecessary to enquire whether the assertion be sustained by proof? The practice of opening the biddings in chancery sales, upon the mere offering of an advance upon the purchaser's bid, has not been adopted in *Maryland;* and its non-adoption is founded on cogent reasons of justice and policy. The doctrine that mere inadequacy of price in a chancery sale, where the sale has been made conformably to the powers and directions specified in the decree, is not of itself sufficient ground for vacating the sale, has been so frequently announced by the judicial tribunals of this State, that a special reference to authorities to sustain it is deemed unnecessary. A sale thus made will not be set aside, or its ratification refused for inadequacy of price, unless the court believe that such inadequacy was the result of fraud, surprise, mistake, or unfairness in the sale. And the inadequacy of

price is for the most part regarded as the inducement to the action of the court, after the establishment of a cause deemed sufficient to warrant its nullifying interposition. The case of *Tyson vs. Mickle et al.* 2 *Gill*, 384, which has been referred to as an authority in the case before us, cannot have the slightest weight on the question now to be determined.

The cases are wholly dissimilar; differing as widely in their facts as in the principles of law, by which they must be decided. In the case before us, the trustee made the sale in strict conformity to the powers and directions given to him by the decree of the Chancery Court; and, therefore, the purchaser having entered into the contract with a duly authorized agent, at a *bona fide* sale, fairly conducted, had a right to insist upon its validity—although at the time it was made, it operated prejudicially to those whose interests it was designed to pass.

But, in the case of *Tyson vs. Mickle et al.*, the purchaser knew, or is presumed to have known, at the time of his purchase, that he entered into a contract with an unauthorized agent,—and that its affirmance, unless assented to by the parties concerned, depended upon the equitable circumstances, with which it appealed to the justice and conscience of the Chancellor; and that if any of the parties interested objected to the sale, and showed that the property was sold at less than its fair market value at the time of sale, or at less than it would have brought had the sale been made at public auction, according to the terms of the decree, that the sale would not be ratified. In the making of such an unauthorized sale, the trustee is the agent of the Chancery Court, and not of the parties to the suit,—and, therefore, it is not to be set aside as a matter of course, if objected to by one of the parties. But it is to be vacated by the Chancellor, if it appear to him that the objectant was damnified by the sale; that its vacation is required as an act of justice to him. It was the absence of all proof of such damnification or injustice to the objectant, that induced this court to ratify the sale made in the case of *Tyson vs. Mickle et al.*

That the inadequacy of price alleged as existing in the sale

before us would not, in the State of *New York*, be regarded as a sufficient ground for refusing to ratify or nullify such a sale, is abundantly shown by the cases of *Williamson vs. Dale and others*, 3 *Johns. Chan. R.* 290. *Woodhull vs. Osborne*, 2 *Edwards' Ch. R.* 614. *American Insurance Company vs. Oakley*, 9 *Paige*, 259; and *Tripp vs. Cook*, 26 *Wendell*, 143.

The second exception states that the exceptant was surprised and prejudiced in his rights by the sale. If it be true that he was surprised by the sale, it should, according to the proof in the cause, be attributed to his own want of foresight and caution. If he has been prejudiced in his rights, it is attributable to the same causes. He has nobody to complain of but himself. The trustee appears in all things faithfully to have discharged the duties of his trust.

The third exception is, that the sale was made by the said trustee through an auctioneer, who, by his crier, put up said property at $13,000; that said bid was by the auctioneer, and there was no bid in fact made at the sale above, or at that sum by any person. The proof in the cause clearly shows that there was a real bid of $13,000 made for *Wagner*, the purchaser, and that on that bid the property was struck off to him. Whether the bid was made by *Wagner*, or by some other person acting in his behalf, is wholly immaterial. Neither in practice, nor in principle, is it necessary or usual to announce at the time the bid is received the name of the bidder; nor is it at all necessary that it should be known to the bidders, or persons attending the sale, before the property is struck off. The third exception, therefore, cannot avail the exceptant.

The fourth exception is, that the said trustee, before the sale, told the auctioneer that the limit was $13,000, and if he got no bid above that, to strike it off to *Mr. Wagner*. How this communication from the trustee to the auctioneer can form an objection to the sale, it is difficult to divine. It is not pretended that it prevented any other person from bidding a larger amount; nor does it appear how it could have had any such tendency. Such a communication was the natural, legitimate result of the circumstances under which the sale was about to

take place. It forms not the shadow of an objection to the validity of the sale.

The fifth exception is, that in substance it was not a public sale, though so in form. There is nothing in the proof taken in the cause to sustain this exception. Both in form and substance, it was a valid public sale,—and the Chancellor's final order for the ratification thereof should be affirmed by this court, with costs.

From what has been stated in this opinion, we are not to be understood as deciding, that the inadequacy of price may not be so gross and inordinate as to furnish evidence of such misconduct or fraud in the trustee as would vitiate his sale.

ORDER AFFIRMED.

CHARLES BROOKS *vs.* WILLIAM S. ELGIN AND JAMES H. ELGIN.—*December*, 1847.

An unaccepted draft, drawn by a *third* party upon a *fourth*, was endorsed by a debtor to his creditor on account of a precedent debt;—acceptance was refused, and notice given to the drawer by the holder—but notice was not given to the debtor endorser for some months after such refusal. In an action by the creditor against the debtor to recover his precedent debt, the defendant cannot defeat the action to the amount of the draft, by insisting that the holder should have sued the drawee, who had funds of the drawer at the time of the presentation of the draft—the drawer being sued by the creditor, who still retained the draft.

Refusal to accept or pay a draft, established by oral proof, is a question of fact; whether notice of such refusal was given within a reasonable time, is a question of law.

Whether an assignee of a draft, delivered and received on account of a precedent debt, has or has not used due diligence in endeavoring to recover the sum assigned to him, from parties on the draft liable to the assignor, is a question of law.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, brought on the 24th January, 1844, by the appellees against the appellants, *Thomas H. Per-*

due and *William Nichols*, trading under the firm of *Perdue, Nichols & Co.* The appellant only appeared below, and pleaded *non-assumpsit.*

The plaintiffs, to support the issue on their part, proved the partnership of the plaintiffs and defendants, as laid in the declaration; and also proved, by competent testimony, the note and account following:

"*Shannondale Furnace, April 21st*, 1842.

"$441 35. Ninety days after date, we promise to pay *J. H. Elgin & Co.* or order, four hundred and forty-one dollars and thirty-five cents—negotiable and payable at the *Bank of the Valley of Va. in Charlestown*, without offset, for value received. PERDUE, NICHOLS & Co."

"Endorsed, *J. H. Elgin & Co.*"

Messrs. Perdue, Nichols & Co. To *J. H. Elgin & Co.*

DR.—An account from 22d April to 24th November, 1842, in the aggregate $220 40.

The defendant then offered in evidence the following account and draft:

Messrs. Perdue, Nichols & Co. To *J. H. Elgin & Co.*

DR.—An account from 14th April to 20th September, 1842, in the aggregate $635 18, for the same items and the promissory note of the defendants.

CR.—A draft on the *Balt. and Ohio R. R. Co.* for $580, leaving a balance of $55 18 due *J. H. E. & Co.*

The draft was as follows:

Balt. and Ohio R. R. Co.

Will please pay to *Hugh Gallace*, or order, five hundred and eighty dollars, for castings used in re-constructing *Harper's Ferry Viaduct, out of any monies due me on my final estimate.*

J. P. SHANNON.

Harpers Ferry, February 14th, 1842.

Which said draft was endorsed:

April 4, 1842. The within order I transfer to *Messrs. Perdue, Nichols & Co.* HUGH GALLAGE.

Pay to the order *J. H. Elgin & Co.*

April 8th, 1842. PERDUE, NICHOLS & Co.

The plaintiffs then proved by *J. G. Cobbs*, that on the day the above draft was received by the plaintiffs, he came as their clerk to *Baltimore*, and presented the same to the *Balt. and Ohio R. R. Co.* when he was informed by *Mr. Atkinson*, he thinks, the secretary of the Company, and if not by *Mr. Cann*, the clerk of the chief engineer, that the said draft could not be accepted, and that the Company had no funds belonging to *Mr. Shannon;* that he at once called on *Shannon*, the drawer, about the draft, who said that he had a dispute with the *R. R. Co.* about the settlement of the account, and did not pay the draft. Witness subsequently returned with the draft to *Harpers Ferry*, and saw *Perdue*, one of the defendants, on or about the 1st January, 1843, who asked whether the said draft had been sent to *Mr. Latrobe*, for suit against *Shannon*, which he told him had been done. Witness was here told that the draft was in truth sent on the 27th May, 1843, to *Mr. Latrobe.* He says, however, that he is confident that this conversation took place with *Perdue* at the time stated, which witness fixes; and he believed the draft had been sent at the time he spoke to *Perdue*, though he did not, in fact, know whether it had been sent or not.

The defendant offered in evidence the final statement appended hereto, and the papers connected therewith.

Dr.—*The Baltimore and Ohio R. R. Co. in account with Shannon & Scofield, (Contractors.)* Cr.

For the re-construction and new part of the wooden superstructure of the *Harpers Ferry Viaduct*, and the trestle work of *Harpers Ferry.*—Aggregate of debt, . . $ 61,757 14

By credits from 31st May, 1840, to the 13th September, 1842, in cash, ... $ 49,576 15

Balance due *S. & S.* 12,180 99

$ 61,757 14

Engineer's Office, Balt. and Ohio R. R. Co.
Baltimore, September 14th, 1842.

To JOSHUA I. ATKINSON, Esq.
Sec. Balt. and Ohio R. R. Co.

Sir,—*Messrs. Shannon & Scofield*, contractors for the reconstruction and new part of the *Harpers Ferry Viaduct* and *trestling*, at *Harpers Ferry*, have completed their work under that contract, and are entitled to be paid in full the balance of $12,080 99, appearing to be due them in the above account current, on their signing the annexed final receipt and release.

BENJ. H. LATROBE, *Chief Engineer.*

To which was annexed the following power:

I hereby authorize and empower *Mr. Joseph P. Shannon* to sign any receipt in my name, that may be necessary to settle with the *Balt. and Ohio R. R. Co.*—the balance due from said Company to the firm of *Joseph P. Shannon* and *Jesse Scofield*—the said balance being, as per account furnished by said R. R. Co., $12,080 99.

Dated 14th September, 1842. JESSE SCOFIELD.

To the said account current was annexed a receipt and release to the Company of the balance above mentioned by *Scofield*, dated 6th February, 1843.

The plaintiffs proved that the sum of $12,084 was paid over by the *R. R. Co.* to *Shannon* on the presentation of said engineer's order, and before the 7th February, 1843, and further proved that on the 27th May, 1843, they sent the said draft or order to *Mr. J. H. B. Latrobe* for collection.

The defendant further proved, that no effort was ever made by plaintiffs to collect the amount of the draft from the *R. R. Co.* or *Gallace*, the party who assigned the same to defendant.

The plaintiffs also gave evidence that the draft was received as *collateral security*, and it was admitted that the plaintiffs

did not send this draft for suit until 27th May, 1843, and never used any means to obtain payment of said order from the R. R. Co. except its presentation as aforesaid.

The defendant proved by *J. I. Atkinson*, the secretary of the R. R. Co. that he had no recollection that this order had ever been presented to him, but that he would not say that it had not been.

The plaintiffs then offered evidence by the secretary of the Company, that in no event would he have accepted or paid the draft of one of the partners, like that in question, out of the partnership fund.

The defendant prayed the court to instruct the jury:

If the jury believe that on the 22d September, 1842, the defendant assigned to the plaintiffs the order given in evidence, which plaintiffs accepted, and gave the receipt given in evidence, that *J. P. Shannon* and *Scofield* were contractors on the *Balt. and Ohio R. R.* and that on the date of the order given in evidence, no final estimate had been made, but that on the 14th September, 1842, a final estimate was made, by which a balance of $12,080 94 was found to be due said *Shannon* and *Scofield* from the *Balt. and Ohio R. R. Co.* and that the plaintiffs in this cause never took any steps or used any legal diligence to recover the said order, or the amount thereof, from the *Balt. and Ohio R. R. Co.;* and if the jury further believe that such order was given on account of work done by *Gallace* in the re-construction of the *Harpers Ferry Viaduct*, that *Shannon* was one of the parties contracting for the re-construction of said *Viaduct;* and that the plaintiffs presented said draft to some person at the *Balt. and Ohio R. R. Co.* who said there were no funds; that said draft was never delivered back to the defendant by the plaintiffs; and that no notice of its non-acceptance or non-payment was given to the defendant, till January, 1843; that then the plaintiffs are not entitled to recover, but for the balance of their account, after deducting the said draft or order.

If the jury believe the facts stated in defendant's *first* prayer, and further find that the R. R. Co. at the time when such order

was presented, had funds more than ample to pay such order, and continued to hold said funds till *February*, 1843; that the plaintiffs have not used any diligence to collect the sum from them; then the plaintiffs are not entitled to recover, for the amount of said order on the said R. R. Co.: which prayers the court, (ARCHER, C. J. and PURVIANCE, A. J.) refused to grant. The defendant excepted.

The testimony on both sides being closed, and which is to be taken as forming part of this exception, the plaintiffs, by their counsel, prayed the court to instruct the jury—that if the jury shall believe *that after the refusal of the R. R. Company to pay*, or accept the draft of *J. P. Shannon*, notice within a reasonable time—*of which the jury are the judges*—was given to *Nichols, Perdue & Co.* of such non-payment or non-acceptance, then the defendant is not entitled to be credited with the amount of the said draft: which instruction the court, (ARCHER, C. J. and PURVIANCE, A. J.) gave. The defendant excepted and appealed.

The cause was argued before DORSEY, SPENCE, MARTIN and MAGRUDER, J.

By MCMAHON for the appellant, and

By LATROBE for the appellee.

MAGRUDER, J., delivered the opinion of this court.

We are of opinion that the court below did not err in refusing to give the instruction of the defendant, as stated in the first bill of exceptions. The facts stated in the prayer, even if admitted or proved to the satisfaction of the jury, would not have entitled the defendant to claim a deduction from the plaintiffs' claim, of the amount of the order offered in evidence.

We think that the court below erred in giving the instruction, which is to be found in the second exception. In that instruction, it is assumed that the Rail-road Company refused to pay or accept the order. The court also said the jury were

the judges whether notice of such a refusal was given within a reasonable time to the defendant below.

In a case like this, (*Crawford vs. Berry*, 6 *G. & J.*) this court said: "Active diligence is imposed upon the obligee in pursuing the obligor, for a recovery of the sum due on the bill assigned to him, so that nothing shall be lost by his *laches;* and the question is, whether he did use due diligence, which is a question for the decision of the court."

Affirm first exception, and second exception reversed.

PROCEDENDO AWARDED.

CORNELIUS H. OWINGS AND FRANCIS R. GRIFFITH, EXECUTORS OF NICHOLAS OWINGS, *vs.* JOHN B. EMERY AND CYRUS GAULT.—*December*, 1847.

On the 11th June, 1840, *N. O.* leased to *E. & G.* a *granite quarry*, known by the name of *F. R. with the license of quarrying* and getting away stone, for the term of six years, from 10th November following, and the lessees went into possession. On the 25th July, 1836, *B. & C.* who had title, leased to *D.* all their estate and interest, being two-third parts *of all that lot*, within the farm of *N. O.* called *F. R.*, for the term of five years, which before the action brought, came to *E. & G.* by assignment, as to one-half. The metes and bounds in both leases were the same. In an action by *N. O.* for the rent due 1st Nov. 1841, under the lease of June, 1840. *Held:*

1st. That the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to the quarry, as it was not opened at the date of that lease.

2d. That this case is not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil; that of 1840 a lease or license to quarry stone.

3d. If a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land, it shall be intended that his interest is as general as his lease.

4th. Making of new mines is waste, unless the lease is of all mines on the land.

5th. A declaration in a lease dated in 1840, that a quarry "had been recently or a short time ago, possessed and worked by *W.*" cannot be understood as meaning that the quarry was opened four years previously.

Owings & Griffith *vs.* Emery & Gault.—1847.

APPEAL from *Baltimore* County Court.

This was an action of *debt*, brought by the appellants against the appellees, to recover $500 rent on a lease, made by *Nicholas Owings* on the 11th June, 1840, to the appellees, for the term of six years. The lessees were to enter the demised premises on the 11th November, 1840, and the rent claimed was for the *first* year. The defendants pleaded *nil debet*, with leave to give any special matter in evidence which might be pleaded in bar, upon notice, &c.

1ST EXCEPTION.—At the trial, the plaintiffs read in evidence the lease, as follows:

"This indenture, made this 11th June, 1840, between *Nicholas Owings*, of, &c. and *John B. Emery* and *Cyrus Gault*, witnesseth, that the said *N. O.* in consideration of, &c. hath demised, &c. and by, &c. doth demise, &c. unto the said *E. & G. the granite quarry and quarries, situate in Baltimore Co. near the Patapsco river or falls, on land of said Owings, called and known by the name of 'Fox Rock, or Fox Rock Quarry,' being the same which was, or were lately possessed and worked by Wood & Co. and now by Joseph Yager & Co.* and which are more particularly described, &c.; *and also the leave, license, right and privilege of quarrying*, getting out, working and carrying away granite stone from said quarry or quarries, to the use and benefit of said *E. & G.* &c. for the term of six years, from and immediately after the 10th November next ensuing the date hereof, in such quantities, from time to time, as the said *E. & G.* may have occasion to use in their business, or may choose to quarry—not less than forty thousand cubic feet in each year of the said term—together with, &c. the use of so much, &c. yielding and paying to the said *N. O.* his, &c. for the use of the premises and the stone to be quarried and got out of said quarry or quarries, during said term of six years, one cent and one quarter of a cent for each and every cubic foot of stone which shall or may be so quarried and got out therefrom by the said *E. & G.*—they hereby binding themselves to quarry and get out at least forty thousand cubic feet in each and every year during said term, or to pay

for that quantity at the rate aforesaid, if they fail to quarry and get out that quantity, and all over to be paid for, &c. And the said *N. O.* for, &c. doth hereby covenant with the said *E. & G.* that they, the said *E. & G.* upon the payment of the said rent or quarry leave, and performance of the covenants above reserved and mentioned, on their part to be paid and performed, shall and may quietly possess, use, occupy and enjoy the said *Fox Rock Quarry* and premises, included within the following lines, viz: *commencing at, &c. a stone marked No. 1, and running east to a white oak tree, marked with three notches; then north-east to a stone marked No. 2; then north to a stone marked No. 3; then west to a stone marked No. 4, and then to the place of beginning*, for the purpose of freely quarrying, getting out, working and carrying away stone therefrom, at their discretion as aforesaid, during," &c.

The plaintiffs further proved that the defendants were in possession of the demised premises during the years 1840 and 1841, &c.; that the plaintiffs were executors of *N. O.* before the bringing of this suit,—and that he died in December, 1841.

The defendants then read in evidence the notice served on plaintiffs counsel under the leave in this cause, of the matters of defence relied on by them, and a lease dated 25th July, 1836, from *Beale Owings* and *Cornelius H. Owings*, who it is admitted had title at said date to make such lease, to *Caleb D. Owings, for all their estate and interest—being two-third parts of and in, all that piece or lot of ground within the limits of the farm of Nicholas Owings, being in Baltimore Co. which lot of ground is called Fox Rock, and which was granted and conveyed by said Nicholas Owings to the said Beale, Cornelius H. and Caleb D. Owings*, by indenture, bearing date on the 20th November last past, and recorded, &c. and which is contained within the description following—that is to say: beginning for the same at a stone marked No. 1, standing on the outline of a tract of land, called "*Wells and Howard's First and Second Adventure*," being a division line between the lands of the said *Nicholas Owings* and a certain *Noah Worthington*,

and being south of *Swett & Co's* rail-road, and running thence east to a stone marked No. 2; then running north to a stone marked No. 3, planted in an old field, known by the name of *Frogs' Field;* then west to said division line, between the lands of the said *Nicholas Owings* and *Noah Worthington*, running to a stone marked No. 4,—and then south, running with said division line, to the place of beginning; containing six acres, more or less—to have, &c. the two-thirds of the piece or parcel of ground hereby intended to be demised unto the said *C. D. O.* his, &c. for the term of *five* years, accounting from the 25th July, 1836, and thence next ensuing, yielding and paying therefor yearly, and every year during said term, to the said *B. O.* and *C. H. O.* &c. the rent or sum of six cents, if demanded, and no more.

The defendants also read in evidence the assignment of said lease, dated the same day, from said *Caleb D. Owings* to *Charles Wood*, *Joseph Yager*, *John D. Stewart* and *Edward Green*. And offered to prove by said *Yager*, that said *Caleb* was a partner with said *Wood*, *Yager* and *Stewart*, but withdrew from said firm about 1839; that on 11th June, 1840, the defendants were the owners of one undivided half part in interest in said lease, dated 25th July, 1836, and said *Yager* of the other half part; and that the defendants and said *Yager* remained possessed of said demised premises, under and by virtue of said lease of 25th July, 1836, until its expiration in July, 1841. The defendants offered all said evidence for the purpose of showing that the lease now sued on did not take effect until 25th July, 1841.

Whereupon the plaintiffs, by their counsel, objected to said offered evidence, and every part thereof; but the court, (PURVIANCE, A. J.) overruled said objection, and admitted the said offered evidence, and every part thereof, to be given to the jury, *in reduction of the amount claimed in this action.* The plaintiffs excepted.

The other exceptions are sufficiently stated in the opinion of this court.

The verdict and judgment of the County Court being against the plaintiffs below, they appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By PARRAN and BRENT for the appellant, and

By HINKLEY and NELSON for the appellees.

MARTIN, J., delivered the opinion of this court.

In this case an action of debt was instituted in *Baltimore* County Court, by the appellants against the appellees, to recover the sum of $500, the amount alleged to be due on the 10th November, 1841, for one year's rent of stone quarry called the *Fox Rock Quarry*, which had been demised to the appellees by *Nicholas Owings*, in an indenture bearing date the 11th June, 1840, for the period of six years, to take effect from the 10th November, 1840.

The defendants pleaded to this action *nil debet*, and under the leave granted to rely upon any defence that could be specially pleaded, gave notice that they would offer in evidence a lease of the 25th July, 1836, for the *Fox Rock Quarry*, made by *Beale Owings* and *Cornelius Owings* to *Caleb D. Owings*, and the assignment of two-thirds parts thereof by *Caleb D. Owings* to *Wood & Yager*, and which was outstanding, unexpired, and in full force, at the date of the lease on which this action was brought, so that the lease of the 11th June, 1840, could not commence until the lease of the 25th July, 1836, had terminated or expired.

At the trial below, the plaintiffs offered in evidence the lease of the 11th June, 1840, and proved generally that the defendants were in the occupation of the demised premises in 1840 and 1841, and in this posture of the case, and in the absence of all explanatory or defensive testimony, the defendants were to be regarded in legal contemplation, as in the possession and enjoyment of the quarry in question, under the lease of the 11th June, 1840, and were therefore disabled from impugning or

controverting the title of their lessor, *Nicholas Owings*, the appellants' testator.

At this stage of the cause, the defendants, for the purpose of showing that they had been evicted or interrupted in their right of possession as lessees of the *Fox Rock Quarry*, under the lease of the 11th June, 1840, and that they were not responsible for rent prior to the expiration of the lease of the 25th July, 1836, offered in evidence the lease of the 25th July, 1836, in connection with the oral testimony of *Yager*, who proved that on the 11th June, 1840, the defendants were the owners of the undivided half part in interest in the lease of the 25th July, 1836, and that the said *Yager* was the owner of the other half part, and that the defendants and said *Yager* remained possessed of the said demised premises under and by virtue of the lease of the 25th July, 1836, until its expiration in July, 1841. The plaintiffs below objected to the admissibility of this evidence, but the objection was overruled and the evidence received. And the testimony offered by the plaintiffs, as exhibited in the second, third and fourth bills of exceptions, having been rejected, upon the application of the defendants, the court instructed the jury, that upon the evidence aforesaid the plaintiffs could not recover any rent stipulated to be paid anterior to the 25th July, 1841, because the evidence, if believed by the jury, shows such an interruption of the possession by the defendants under the lease now in suit, as precludes the plaintiffs from recovering any rent anterior to the 25th July, 1841.

The counsel for the plaintiffs excepted to the ruling of the court with respect to the admissibility of the testimony offered by the defendants in the *first* exception, and to the instruction given by the court to the jury as exhibited in the *fifth* exception. Both the exceptions raised substantially the same question. The exposition of the law of the case, to be found in the opinion of the court, as expressed in the *fifth* exception, was predicated upon the evidence introduced under the *first* exception, and if the court erred in admitting the testimony presented by the plaintiffs in the *first* exception, their instruction to the

jury was necessarily erroneous, as under such circumstances there would be no evidence to sustain it.

It is apparent from the statement we have thus given of the pleadings in this cause, that the claim interposed by the defendants for a reduction and apportionment of the rent can only be maintained upon the ground that a case was presented of conflicting leases, and the point made by the counsel for the plaintiffs on this branch of the argument was, that there was no incompatibility between the lease of the 25th July, 1836, and the lease of the 11th June, 1840, because the first lease operated only as a grant of the superficies or surface of the soil, and did not pass a right to the quarry, which was for the first time demised to the defendants by the lease of the 11th June, 1840.

In *Saunders'* case, reported in *5 Coke's Rep.* 22, it was adjudged:—

1st. If a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig for it; forasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his interest is as general as his lease is; that is, that he shall take the profit of the land, and by consequence, of the mine in it.

2d. If the mine were not open, but included in the bowels of the earth at the time of the lease made in such case by leasing of the land, the lessee cannot make new mines, for that shall be waste.

3d. If a man hath mines hid within his land, and leases his land and all the mines therein, then the lessee may dig for them, and therewith agrees 9 *E.* 4, 8, where it is said, that if a man leases his land to another, and in the same there is a mine, (which is to be intended of a hidden mine) he cannot dig for it; but if he leases his land and all mines on it, then although the mines be hidden, the lessee may dig for them.

By an examination of the lease of the 25th July, 1836, it will be found that there is no grant of the *Stone Quarry;* the expressions in the lease are: all their estate and interest, being two-thirds part of and in all that piece or lot of ground within the limits of the farm of *Nicholas Owings*, being in *Baltimore*

County, which lot of ground is called *Fox Rock*; and it is perfectly clear, that the quarry demised to the defendants by the lease of the 11th June, 1840, was not covered by the lease of the 25th July, 1836, unless the quarry was opened at the date of the lease.

The lease of the 11th June, 1840, contains the following description of the quarry granted by *Nicholas Owings* to the defendants; "the granite quarry and quarries situated in *Baltimore* County, near the *Patapsco* river or falls, on land of said *Owings*, called and known by the name of *Fox Rock* or *Fox Rock Quarry*, being the same which was or were lately possessed and worked by *Wood & Co.* and now by *Yager & Co.*;" and these expressions were relied on by the counsel for the appellees, as showing that the quarry was open on the 25th July, 1836. But certainly no such deduction can be drawn from the use of these descriptive expressions. When the lessor, on the 11th June, 1840, said, that the quarry which he was describing had been recently, or a short time ago, possessed and worked by *Wood & Co.* he cannot be understood as meaning that the quarry was opened, and in the occupation of the persons to whom he referred, as long back as the 25th July, 1836, a period of nearly four years.

We have examined the testimony delivered by *Yager*, for the purpose of ascertaining if there was any fact stated by the witness, from which the jury could infer that the quarry in question was open at the date of the lease of 25th July, 1836. But no such fact is supplied by the testimony of this witness. He says, that on the 11th June, 1840, the defendants were the owners of one undivided half part in interest in the lease dated the 25th July, 1836, and he, the witness, of the other half part, and that he and the defendants remained possessed of the demised premises under and by virtue of the lease of the 25th July, 1836, until its expiration in July, 1841; and when the witness speaks of being possessed of the demised premises, we understand him as referring to the lot called the *Fox Rock*, granted by the lease of the 25th July, 1836, and if he could be regarded as alluding to the quarry demised by the lease

upon which this suit is brought, it could not be relied on as indicating that the quarry was open on the 25th July, 1836, as his evidence does not profess to carry the possession of himself and the defendants further back than the 11th June, 1840.

We think that upon the circumstances of the case, as presented by the *first* bill of exceptions, the lease of the 25th July, 1836, must be treated as granting only the superficies or surface of the soil, and conferred upon the lessee no authority to dig for or work the quarry mentioned in the proceedings, and that there was, therefore, no incompatibility between the rights demised by the first lease, and those granted by the lease of the 11th June, 1840. And this being so, it follows that the defendants, as the lessees of the *Fox Rock Quarry*, could not have been impeded or interrupted in the use and enjoyment of that quarry by the lease of the 25th July, 1836.

The pretension of the defendants that they were entitled to a reduction and apportionment of the rent which had become due on the 11th November, 1841, was not sustained by the evidence in the cause, and the court below erred in admitting the testimony offered by the appellees to the *first* exception, and in the instruction which they gave to the jury in the *fifth* exception.

The testimony offered by the plaintiffs below, in the *second*, *third* and *fourth* bill of exceptions, was proposed to be introduced for the purpose of repelling the evidence which had been produced by the defendants, as exhibited in the first bill of exceptions; and as according to the view we have taken of that evidence, it ought not to have been received by the court, and is to be treated as not in the cause. The questions decided by the County Court with respect to the admissibility of the testimony offered by the appellants, have become mere abstract propositions, upon which it is not necessary for this court to express an opinion. Practically, the testimony was properly rejected, for it results from the opinion we have expressed upon this case, that the right of the appellants to recover the sum of $500, as the amount of rent due to them at the period of the institution of this action, was not affected by the lease of the 25th July, 1836.

The judgment of the County Court is reversed on the *first* and *fifth* bill of exceptions, and affirmed upon the *second*, *third* and *fourth* bills of exceptions.

JUDGMENT REVERSED—PROCEDENDO AWARDED.

Isaac G. Magruder and Elizabeth his wife *vs.* F. L. Darnall.

F. L. Darnall *vs.* Isaac G. Magruder and wife.

December, 1847.

A guardian may be responsible to his ward as bailiff, or guardian before he bonds; but in such a case, the bill should charge an entry on the ward's estate, and perception of profits before he bonded.

But where the bill is framed in reference to his duty as guardian, deriving his authority as such from his appointment, the account should be taken from the date of his bond.

When it is claimed to charge a guardian with perception of rents and profits before he bonded, as well as after, and there were no allegations in the bill on the subject of profits before his appointment, that question is not in issue in the cause.

So, where a widow administered upon her *first* husband's estate, her *second* husband cannot be made responsible for receipts prior to his marriage, without she is a party to the bill, and those receipts put in issue by proper allegations.

A release of all claims against a guardian concerning specific personal property, is evidence of the delivery of such property to the releasor, his ward.

An appraisement of a ward's property, made by order of the Orphans court, is not conclusive evidence of the value of such property against the guardian; he may rebut it by proof. The act of 1793, ch. 101, sub-chap. 12, sect. 6, does not make it conclusive.

An account of a guardian charging himself with one year's use of the minor's estate, and crediting the whole amount of allowances—examined and passed by the Orphans court which appointed him—is a judicial act of that court, and is *prima facie* evidence of the matters therein contained. It may be impeached by proof.

The court will not reverse a decree, on the ground of error committed in the mode of averaging proof, when assured, that the whole evidence in the cause fully justified the credits allowed in relation to the subjects affected by such average.

Magruder and wife *vs.* Darnall and wife.—1847.

Where the entire estate in the hands of a guardian is not more than necessary to pay expenses, proper and necessary to be made, and which were made, the court will not reverse a decree, to enable them to charge the guardian with a greater sum by way of interest.

A guardian in a trust of considerable duration, who performed his duties, except in a failure regularly to pass accounts—who, however, promptly answered—threw no obstacles in the way of investigation, and rendered a general account in his answer to a bill filed against him, is entitled to a commission of seven and one-half per centum.

Where the allowance of that rate of commission exhausted the balance for which the Chancellor decreed, this court reversed the decree, with costs, and dismissed the bill.

Cross Appeals from the Court of Chancery.

The bill in this cause was filed on the 18th December, 1839, by *Isaac G. Magruder and wife*, and alleged that *Elizabeth*, his wife, was one of the heirs of *Richard Hill*, who died in the year 1816, possessed of real and personal property; that in a few years his widow, *Margaret Hill*, intermarried with *Francis L. Darnall*, who jointly with *Joseph Wilson*, administered on the personal estate of *Richard Hill;* that after said administrators had settled up the estate of *Richard Hill*, *Francis L. Darnall*, who was at that time in the possession of the entire real and personal estate of *Richard Hill*—the children of *Richard Hill*, four in number, *being all minors*—applied to the *Orphans Court of Prince George's County* for the appointment of a guardian thereto; that he was accordingly appointed for all of them, and accepted the trust, and took and retained possession of all their property; consisting of lands, negroes, stock, &c.; that as guardian, he continued in possession of the said *E's* property until the year 1830, or thereabouts, deriving great profits therefrom; that he sold several valuable negroes, for which he has never accounted; that he has never rendered any accounts, nor in any way settled with the said *E.* or her husband, nor with the said *Orphans Court. Prayer*, that *F. L. D.* may answer, account, and also discover the amount of his sales, receipts, &c. and for general relief.

The defendant answered the bill, fully and particularly admitting the relationship of the parties, and his possession of

E's estate; that he paid off the debts of *R. H.* and endeavored to avoid a sale of any of his estate for such payments; that in this way he paid off many debts, which do not appear in his account of the 18th November, 1818, being paid after that time; that he passed no final account. The answer then proceeded to discover how the defendant had administered the trust.

The appraisement of the personal estate of *R. H.* showed that it amounted to $12,208 87
The increase of the personal estate, . . 1,473 37½
The real estate, consisting of a farm of five hundred acres, with improvements, . . . 10,000 00

The negroes of the estate were of all ages, from two to seventy years of age, though principally under twenty-five; many of them quite young. *Elizabeth's* proportion amounted to $1,630.

The defendant filed with his answer a release, dated 16th June, 1828, from *Philip*, *Mary Ann*, *William* and *Margaret Elizabeth Hill* to *F. L. Darnall and wife*, their guardians of "all and all manner of actions, accounts, debts, dues and demands which they *ever had*, *now hath*, or which they at any time hereafter can or may claim or demand against the said *F. L. D. and wife*, touching or concerning the management or disposition of any of the said *P's*, *M. A's*, *W's* and *M. E's* estate, or by reason of any money, rents or profits by them received out of the same, or any payments made thereof during the minority of the said releasors," &c.

With this answer a variety of accounts were filed, in relation both to the administration and guardianship of the defendants: statements of accounts of sales of crops, correspondence concerning the same. A commission was also issued, under which a great mass of proof was collected.

On the 15th November, 1842, the Chancellor (BLAND) by consent decreed an account between the parties, and referred the cause to the auditor of his court.

That officer stated two accounts—A and B. In the *first*

account he charged *F. L. Darnall*, guardian, as of 16th January, 1843.

1. To personal estate, which came to his hands, as per answer of *Darnall*, and first of the administrators of *Hill*, filed 10th November, 1842, ...		$11,279 05
2. To increase, which came to his hands, as per appraisement, filed 10th November, 1842,		1,473 38
3. To annual value of personal estate, as per appraisement, at five per cent. on $12,752 43 from 15th April, 1818, to 15th March, 1832—13 years 11 months, . . .	$8,873 56	
4. To amount of annual value of real estate, estimated as per appraisement, on $10,000, . .	6,958 33	
		15,831 89
5. To proceeds of sales—negro *Harry*, ...	415 00	
Deduct jail fees, . .	4 76	
		410 24
		$28,994 56

Cr.

1. By amount of personal estate transferred to the complainant, *Elizabeth* and others, his wards, as per answer, or accounted for, as per contra, ...	$8,501 62
2. By one-third thereof, being share of the widow of *Richard Hill*, deceased, now wife of the defendant, ...	4,250 81
3. By one-third of the annual value, as per contra, being the widow's share thereof, .	5,277 29
4. By commission on $10,554 59⅔, being two-thirds of the annual value, at seven and a half per cent.	791 59
5. By one-third sales—negro *Harry*, . .	136 75
6. By balance distributed below, . .	10,036 50
	$28,994 56

To balance, per contra, distributed as follows:		$10,036 50
1. To *Isaac G. Magruder and wife*, for one-quarter of said balance, . .	$2,509 12½	
2. To same, for one-third of the share of *Philip Hill*, of the annual value of the real estate, from 15th April, 1825, to 15th March, 1832—6 years 11 months, . . .	192 13	
	2,701 25½	
3. To *William W. Hill*, same,	2,701 25½	
4. To *Mary Ann Hill* "	2,701 25½	
5. To *Philip Hill* for one-quarter do. . $2,509 12½		
Deduct as above, 576 39		
	1,932 73½	
		10,036 50

ACCOUNT B.

DR.—*F. L. D.*, guardian, in account with *Isaac G. Magruder* and *Elizabeth* his wife—16th January, 1843.

1. To amount due by account A, . .		$2,701 25½
CR.		
1. By this amount, as per account passed Orphans court 13th February, 1821,	$197 38	
Deduct commission allowed on account A, ...	14 80	
		$182 58
2. By this amount for board, clothing, and education of said *E.* for 12 years 11 months, excluding the year 1820, allowed by Orphans court, ...		1,293 66
3. By negro hire, ...		12 00
4. By balance due, with interest, from 13th March, 1832—10 years 10 months 1 day, until paid, ...		1,213 01
		$2,701 25½

On the 7th March, 1843, upon the application of the defendant, the Chancellor (BLAND) remanded the cause to the auditor for a further report, with liberty to the parties to take proof. This order led to the introduction of much more proof into the cause, shewing further payments by *Darnall & wife*, &c.

The complainants in equity excepted to the proof taken under one of the commissions, and directed the auditor in reporting his accounts, to state one for them, showing their claim on the principles of the accounts heretofore stated, subject to the following exceptions and corrections:

1st. In account A, he will charge the defendant with the annual value of the personal estate, at the rate fixed by the *commissioners*, and sanctioned by the *Orphans court*, viz:—$684 11, and not, as charged in said account, at a much lower rate.

2d. In account A, he will not credit the defendant with $8,501 62—the two-thirds of $2,752 43—which he assumes the defendant paid away, but credit with his actual payments as appear from the proof, especially the exhibits filed with the answer.

3. In account B, the auditor will charge the defendant with the complainants' share of *Ann Magruder's* personal estate, and with the annual income thereof, because there is no foundation for the assumption in the report, that it ever was transferred to the complainant, *Elizabeth*.

On the 25th September, 1843, the auditor made another report:—

Accompanying this report were accounts A, No. 1, made up to the time of his report, in which *F. L. D.*, guardian, in account with the estate of *Richard Hill*, deceased, was debited as in account A, with $28,994 56, and credited with all the credits of that account, and further sums for taxes, repairs, &c. leaving a balance for distribution of $9,064 66, which was divided as before in account A, awarding the complainants $2,458 29½.

B, No. 1, charged *F. L. D.* as guardian in account with *I. G. M. & wife* with that balance, and credited him as follows:

By the amount, as per account, passed by the Orphans court 13th February, 1821, . . . $197 38
Deduct commission allowed in account A. No. 1, ... 14 80
$182 58

By this amount for board, clothing and education of complainant *E.* for 12 years and 11 mos. excluding the year 1820, allowed . . . 1,293 66

By hire of *Tildy*, in 1829, ... 12 00

By interest on $480, value of *Priss* and *Moses*, who died in 1825, at 5 per cent. 1 July, 1825, to 15th March, 1832, less commissions, . . 148 87

By balance due 15th March, 1832, . . . 821 18

$2,458 29½

The interest on this balance up to date of auditor's report, was $567 99

Account A, No. 2, charged *F. L. D.*, as guardian, with $30,571 35, and credited him with divers sums, leaving $10,435 46 for distribution among the four children of *Richard Hill*. Of this balance, $2,800 99½ was awarded to the complainants.

Account B, No. 2, charged *F. L. D.*, as guardian, in account with complainant, with the balance of $2,800 99, with one-fourth of two-thirds of the *personal* estate, according to the *appraisement* of 10th November, 1842, $2,280 37; with the *increase* of *E's* share of the *personal* estate, up to the year 1832, after the appraisement, $605; with *E's* share of *Ann Magruder's* personal estate, $740 75, and interest thereon, $208 75. This account then credited *F. L. D.* with the *three first items* of A, No. 1; with the value of *Priss* and *Moses*, deceased negroes, $480; interest and less commission thereon, $148 87; commissions, $15 66, leaving a balance due complainants of $4,503 10, and as of 25th September, 1843.

The interest on this balance from 15th March, 1832, to 25th September, 1843, 11 years 6 months 10 days, $3,114 64, was also allowed.

The complainants excepted to this report and Accounts A and A and B No. 1.

The defendants excepted to all the auditor's reports and accounts, and to the averments of the bill.

On the 27th February, 1845, the Chancellor (BLAND) again referred the cause to the auditor, with directions: "Following the case stated in the bill, which calls for nothing more than an account from the defendant, during his guardianship, of all his ward's property, however acquired, and of certain negro slaves, alleged to have been sold by him; the accounts to be stated cannot be allowed to embrace any other subjects. Commencing on the day when he was appointed guardian, and terminating on the day when the plaintiff, *Elizabeth*, attained the age of sixteen, when the defendant's guardianship ended."

"The judical accounts in the proceedings mentioned, stated and passed by the Orphans' court of *P. G.* County, as of the 8th January, 1821, as a guardian's account, of the defendant with his then ward, the plaintiff, *Elizabeth*, must be received as a judicial act of that court, and as *prima facie* evidence of the matters therein contained, leaving the respective claims and pretensions of the parties not comprehended thereby, and subsequent thereto, to be regulated by the pleadings and proofs in this cause."

"The estimate of the plaintiff, *Elizabeth's*, estate, during the time of her being the ward of the defendant, must be made as of a share of so much *undivided property*, until the time of the distribution, and thenceforward and to that extent, as of so much property held by her in *severalty*."

"The amount of the public taxes, and the costs of the necessary repairs of the edifices on the realty, made by the defendant during his guardianship, to be allowed."

"Interest is to be charged and allowed on the balances shown at the end of each year."

"The defendant, as guardian, is to be allowed a commission of only five per cent."

"The several reports of the auditor, and all exceptions

thereto, so far as the same may be at variance with this order, are rejected."

The Orphans court account mentioned in the preceding order, was the first account of *F. L. D. and wife*, guardians to *Elizabeth Hill*, in which they charged themselves *with one year's use of the minor's estate*, $197 37, and claimed allowance for a medical bill; sinking a well; proportion of repairs of dwelling and tobacco houses; cost of a new wagon for the plantation; county taxes; board, clothing and necessaries, ($100 91,) furnished the minor; register's fees, and a commission of seven and a half per cent. on $197 37. These exhausted the sum debited the guardian. This account was sworn to by *F. L. D.* and *after due examination, was passed by the Orphans court on the 13th February*, 1821.

Similar accounts were, at the same time, passed in relation to the other children of *Richard Hill.*

On the 22d September, 1845, under the order of the previous February, the auditor reported:—

Account C, between *F. L. D.*, guardian, and the estate of *Richard Hill*, deceased. In this account he debited *F. L. D.*

1. With the annual value of the real estate, as per testimony, from 1st Sept. 1819, to 1st January, 1820, 4 mos. at $298 per annum,	$ 99 33	
2. With same, from 1st January, 1821, to 1st January, 1829—8 years,	2,384 00	
		$ 2,483 33
3. With annual value of personal estate, 4 mos. as above, at $500 per annum, ...	166 67	
4. With same, *P. E.*, from 1st January, 1821, to 24th June, 1824—3 yrs. 5 months 23 days, ...	1,740 28	
		1,906 95
5. To proceeds of sales—negro *Harry*— with 5 years interest, ...		533 31
		$ 4,923 59

And credited *F. L. D.*—

1. By commission on $4,923 59, at five per cent.	$ 246 18
2. By taxes, ...	216 24
3. By repairs, &c.	640 08
4. By balance, ...	3,821 09
	$ 4,923 59

Of that balance, $636 85 in *E's* own right, and $41 05, one-third of the share of *Philip Hill*, making $677 90, was credited to the complainants, as of 22d September, 1845.

Account D was stated between *F. L. D.* as guardian, with the complainants. It debited him with $677 90, and interest on balances to 1st January, 1826, $7 53 = $685 43, and credited him with $844 41 for board, clothing and education, from 1st September, 1819, to 1st January, 1820, and from 1st January, 1821, to 1st January, 1829, at $100 per annum, and interest, $11 08. This account left due the guardian $158 98, with interest from 1st January, 1829.

Account E was between the same parties—debited *F. L. D.* with $677 90 as before, and interest, $33 64 = $711 54, and credited him with $687 50 for board, &c. at $82 50 per annum, leaving a balance of principal due of $24 05, and interest, $24 12 = $48 16 to the complainant, *E.*

To these accounts, both parties excepted. The substance of the exceptions will appear in the points, raised by the respective counsel in this court, and in the opinion of this court.

The Chancellor (Bland) ratified account E, and both parties appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By C. C. Magruder and A. Randall for *Magruder and wife.*

This bill was filed 12th October, 1838, by *Magruder and wife* against *Darnall*, for an account of the wife's property, composed principally of her share of her father's estate, and

the rents, issues and profits thereof, with which *Darnall*, as her guardian, was chargeable.

It appears that *Richard Hill*, the father, died intestate in the spring of 1817, possesed of valuable real and personal estate, leaving a widow, (who a year after intermarried with *Darnall*,) and four infant children, the youngest of whom, the female complainant, was born in 1812, and intermarried with *Magruder* in 1836. *Hill's* widow, and her brother, *Joseph Wilson*, were appointed administrators, and settled up the personal estate, which was delivered over to *Darnall*, on his intermarriage with the administratrix. *Darnall* was appointed guardian of the children, on the———day of———1819, and continued to hold the property of the female complainant, until about 1832, and refused to account for it, or its profits.

The real and personal estates of the wards were valued 20th March, 1820, by appraisers appointed by the Orphans court, at $1154 11, per annum, and taken by *Darnall* at that appraisement, which was never changed.

The Orphans court afterwards appointed others to appraise and distribute the personalty among the widow and children of the deceased, which was done 24th June, 1824. The share allotted to the female complainant was valued at $1630.

The defendant filed his answer, 30th Sept. 1839, admitting the death of *Richard Hill*, leaving the family and property as alleged; his widow's administration of his estate; her intermarriage with *Darnall;* his appointment as guardian of the children, and taking possession of their estate; he filed various accounts, from 1817 to 1837; denied his indebtedness; *avers that the court* allowed him all the profits, &c., for supporting the wards; and relies on a release purporting to be executed by the wards, 16th June, 1828, when the female complainant was about sixteen years of age.

Much testimony is taken by both parties under a commission.

The complainants excepted to this testimony, and complainants and defendant except to the auditor's accounts. Defendant also excepted to the averments of the bill.

The chancellor decreed 11th October, 1845, that defendant

pay complainants $48 16, with interest and costs, from which each party appealed to this court, and entered into an agreement to take up one record, and otherwise provide for the payment of the costs of the appeal.

The complainants will contend, that the defendant is responsible to them in this suit, for his ward's property, and the rents, issues, and profits thereof, from the time it came into his possession, or the possession of his wife, with which he ought to have been charged, viz:

1st. With the rents of the real estate, and the time of the personal estate, from the death of his ward's father in 1817, to the time of his being appointed guardian, 15th April, 1818, during which time this property was in the possession of the wife of the defendant.

2d. With the value and hire, or profits of the personal property of the female complainant, bequeathed to her by *Mrs. Anne Magruder*, of whose estate the defendant was the executor.

3d. With the appraisement (made 20th March, 1820, by the authority of the Orphans court,) of the annual value of the ward's real and personal property, derived from her father, and that no deduction for taxes, repairs, medical accounts, &c. &c., are to be made therefrom.

4th. With negro *Nelly* and personalty other than negroes, returned by the appraisers, or with an allowance for their value and use.

5th. With interest on all these sums in half yearly rests.

They will also contend, that the complainant, *Darnall*, ought not to have been allowed any of the following credits:

6th. The sums charged against the female complainant, in the account purporting to be a guardian account, passed by the Orphans court, whereas, it was no such account, and ought to have been rejected as illegal; and its charges against the female complainant, are unjust and illegal.

7th. Credit for the full share of the ward's personal property, whereas it no where appears that the defendant ever distributed

or paid over any other of that property to his ward, the female complainant, than the negroes.

8th. Board and maintenance of the female complainant, at $82 50 per annum, whereas, according to the proof, most to be relied on, it should have been only $75 00 per annum, nor should he have been allowed for this board and maintenance for so long a time, or by the mode of averaging the proof as stated by him.

9th. For raising and supporting the young negroes of the female complainant, and especially the excessive charges therefor; and that the mode of averaging the proof of many witnesses who testify as to the same sum, as one witness, is erroneous, because such an average should be ascertained by counting, in the average, every witness who testifies thereto.

By W. H. Tuck and Alexander for *F. L. Darnall and wife.*

Magruder and wife, filed their bill against *Darnall* for an account, alleging that *Elizabeth*, the complainant, was one of the daughters of *Richard Hill*, deceased, who died in 1816, leaving a widow, *Margery*, (who afterwards intermarried with *Francis L. Darnall*,) and four children; that he left a large real and personal estate; and after the settlement of the estate by the executors, the said *Francis L. Darnall* was appointed guardian to the said children; took possession of the property, used it, received rents, profits, &c. The bill alleges that he has never accounted *for his said guardianship*, and prays an account for his *said guardianship and trust*, and that he may set forth the amount and value of the property received by him, the names of the negroes, the annual crops, issues and profits, with his appropriations and the receipts therefor.

Darnall answered the bill, in which he states that complainant is one of the children of *Richard Hill;* that he married his widow in 1818; and in 1819, *he and his said wife* were appointed guardians to the children; that by his marriage, he became one of the administrators of the deceased, whose estate was then unsettled; that many debts were due, which he went

on to pay, without making sale of the property, in order to preserve the same for the children, and for which he has never received any credit, as administrator: the answer shews, that by direction of the *Orphans court*, the estate was valued, and believing the annual value as estimated by the commissioners to be too high for the reasons stated, he refused to take the estate at that estimate, but did agree with the court to take the estate, and support the children, and deliver the property over as they might arrive at age. The defendant avers, that he made this arrangement for the benefit of the children, and offers to enter into the most rigid account, that the court may judge between them as to the manner in which his duty has been discharged, averring at the same time, that the complainant will be largely indebted to him, if justice and equity prevail, that a division of the personal estate took place in 1823, by direction of the *Orphans court*, when thirteen negroes were allotted to the complainant, seven of whom were infant children, from two to eight years of age, and of the residue, three died in or about the year 1825, and the other three he shews to have been employed or used, or disposed of by the complainant, *Elizabeth*. They were all, however, supported by defendant, until he left the estate in 1832, except those who had died, and *Tilly* when she was hired out. That those negroes were delivered to complainant in 1828, and have ever since been in her possession, at least up to the time of her marriage. The balance of the personal estate he left with the children, when he left the land in 1832, since which time a division has been made among them. This defendant expressly denies that he received any profit for the estate; but on the contrary avers, that it required his own private means to support the estate and family. The answer shews, that the real estate was poor and unproductive, and that after deducting his wife's third of the rents and profits, one-fourth of the balance would not pay the expense of maintaining the complainant and her negroes, from 1818 to 1832. He files with the answer an account, shewing the disbursements and payments made by him; and also an account of all crops sold and received by him, as far as they can now be ascertained.

The exhibits shew the willingness of the defendant to lay before the complainant and the court, all the details and explanations of the transactions at issue between the parties.

The witnesses of defendants give their opinions of the value of the *real* and *personal* estate of *Richard Hill*, from the time of his death until 1832, and of the dealings of the defendant with the property. These opinions are very much at variance with the testimony on the part of the defendant, thereafter taken, which testimony, it is submitted, is sustained by the exhibits and other proof in the cause.

The inventory of the estate of *Richard Hill*, exhibited with the complainants' bill, and filed by them under the commission amounts to $12,208 87, comprising fifty-six negroes, *mostly women and children;* 25 between the ages of 1 and 10 years; and 10 (men and women,) between the ages of 44 and 94, viz: 44, 45, 45, 60, 62, 63, 60, 68, 52, 94. Some of them, by the appraisement, shewn to have been worth nothing. The farming utensils and stock appear to have been of small value.

It will be found that the witnesses exhibit a knowledge of the subject matters in controversy, for having had in many instances, personal intercourse with the defendant and the property, in the management of the estate. They place a very different estimate upon the property, and represent it as by no means so valuable as the complainant's witnesses had done. This testimony sustains the answer in many material points, and deserves consideration, as proceeding from persons who had good opportunities of becoming acquainted with the subjects of the examination; and besides being more in number, their opinions would seem to command more weight than the three witnesses of the complainant.

Certain guardian accounts, passed by the *defendant and wife*, as guardians, to the children of *Richard Hill*, dated 8th January, 1821, also appear. *These accounts appear not to have been recorded in the register's office* until May, 1842, when it was done on the application of the defendant and wife. *John Tyler* was examined, and *Leonard H. Chew*, to shew the practice of

the office in respect to such accounts; the complainants insisting, that they are not to be regarded as of any validity.

Both parties excepted to these accounts of 25th September, 1843.

The defendant will rely on the points presented by his exceptions to these accounts, in bar of the complainants' claim.

27th February, 1845, the Chancellor passed the order, ante 276, &c.

In obedience to this order, the auditor reported accounts C, D, E, by the last of which he makes the defendant indebted to the complainant $48 06, with interest on $24 04, from date.

Both parties excepted. The Chancellor, on the 11th October, 1845, passed a final decree, ratifying and confirming account E—from which both parties appealed.

The defendant, *Darnall*, will contend on his appeal, in addition to the points presented by his exceptions to the auditor's reports:

1st. That the recovery of the complainants, if any be had, must be limited to the time of the alleged guardianship, and be confined to the particular subject matter, in respect of which the bill charges defendant, and prays an account against him; that is to say, the property acquired by the said *Elizabeth* from her father's estate.

2d. That the auditor has improperly rejected the evidence of defendant's witnesses, in estimating the annual value of the estate of *Richard Hill*, and has placed an excessive value on said estate.

3d. That the auditor has not allowed a sufficient sum for the support of the complainant, *Elizabeth*, and has not allowed him for the support of her young negroes.

4th. That the auditor has improperly charged defendant in respect of the property of complainant, acquired for *Ann Magruder's* estate.

5th. That the account passed by the defendant and wife, as guardians, was properly admitted to record by the Orphans court, and must be regarded as the judicial act of that court,

and should have been taken by the auditor as evidence of the value of the estate, and of defendant's allowance as guardian, in stating the account for subsequent years.

6th. That the rate of commission allowed is too low under the circumstances of the cause.

7th. That if the account be extended beyond the direction of the guardianship, and to other matters than those expressed in the bill of complaint, the defendant will be entitled to a decree against the complainants, for the balance that the pleadings and proofs in the cause may shew in behalf of defendant; and it will be contended, that if such account be stated, the complainants will be largely indebted to defendants.

ARCHER, C. J., delivered the opinion of this court.

The court below did not err in directing the account to be taken from the date of the bond given by *Darnall* as guardian. However *Darnall* might be responsible as bailiff, or guardian before he bonded as guardian, for an entry on the estate of the complainant, and for any perception of the rents and profits before such bonding; if it was designed to charge him in this case for such profits, it was indispensable that the entry upon the estate should have been distinctly charged. Instead of this, the whole bill is framed in reference to his duties as guardian, deriving his authority as such from his appointment.

It is said he was in possession when he applied to be appointed guardian, but when he took such possession, does not appear by the bill. It is afterwards averred, that being appointed guardian, he took possession of the real and personal estate. To allow an account to be taken from a period anterior to the defendant's appointment, would operate as a surprise, and as there are no allegations on the subject, we do not think the question is in issue before the court. The same remarks may be made in reference to the attempt to charge the defendant, the husband of *Mrs. Darnall*, with the perception of the profits by her, anterior to her marriage with the defendant. She was administratrix of her husband, (*Hill*,) and although

as husband he may be responsible for her acts, she should have been made a party, and some charge should have been made in the bill, which would have given notice to the defendant of the claim, and have put in issue the perception of the profits by her; nothing is said in the bill looking to this subject, and no account was properly, therefore, taken of this matter in the court below.

In relation to the value and hire, or profits, of the personal property of the female complainant, bequeathed to her by *Mrs. Magruder*, of whose estate the defendant was executor, with which the complainant seeks to charge the defendant, it will be unnecessary for us to examine the question whether the bill is so framed as to admit of such a charge; because we think there is no proof in the cause of any value, to be attached to the use of this property, beyond its expense, and in relation to the delivery of the property itself, the release given by the ward may be relied on as evidence of that fact.

It is urged that the defendant should be charged with the appraisement made 20th March, 1820, by authority of the Orphans Court, upon the ground that such evidence ought to be conclusive against the guardian of the value. The act of 1798, ch. 101, sub chap. 12, sec. 6, does not make it conclusive evidence. It only declares it shall be evidence against the guardian, and we think it may be rebutted by evidence. That there are inaccuracies in this appraisement is unquestionable, and there is much evidence going to show that it was an inflated valuation.

The Chancellor was right in pronouncing that the guardian's account stated and passed by the Orphans court of *Prince Georges* County, as of the 8th January, 1821, was to be received as a judicial act of the court, and as *prima facie* evidence of the matters therein contained. Evidence which has been offered to impeach it is entirely inconclusive, and cannot form the basis of any judgment against it.

It has been urged as a *seventh* reason for the reversal of the Chancellor's decree, that the defendant ought not to have had the credit for the full share of the ward's personal property.

This point is made on a misconception of the evidence. It is proved by *Joseph Wilson* and *William Hill*, that this property was passed over to the female complainant.

Errors have been committed in the mode of averaging the proof, in relation to the board and maintenance of the ward, and in the mode of averaging the proof in relation to the expense of maintaining and raising the young negroes; but we think that circumstance ought not to occasion the reversal of the decree, as we feel assured the evidence in the cause fully justifies the credits which have been allowed to the defendant on these accounts.

Nor do we feel disposed to charge the defendant with more interest than he is charged with in the account which had been ratified. The whole evidence in the cause which has been carefully examined, induces us to believe that the estate in the hands of the defendant was not greater than was necessary to pay expenses, and necessary and proper to be made.

So far, therefore, as the appeal of *Magruder* and wife is concerned, we affirm the decree of the Chancellor, with costs.

With regard to the appeal of *Darnall*, we think he was entitled to higher commissions. The Chancellor has allowed only five per cent. commissions. This amount of commission was allowed in *Diffenderffer vs. Winder*, notwithstanding there was such conduct on the part of the trustee, as induced the court to charge him with compound interest. This has been a trust of considerable duration, and the guardian seems to have performed his duties, except in a failure regularly to pass his accounts. He has, however, promptly answered: appears to have thrown no obstacles in the way of the investigation, and has rendered a general account. We think he is at least entitled to as great a rate of commission as was allowed in the case of *Hatton vs. Weems*, which was seven and a half per cent. Allowing to him this commission, the balance found against him by Account E, would be more than satisfied. The decree must therefore be reversed, with costs, and the bill dismissed, with costs.

DECREE REVERSED AND BILL DISMISSED, WITH COSTS.

JUNE TERM, 1848.

THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* THE BALTIMORE AND OHIO RAIL-ROAD COMPANY.

In 3 *Howard Rep.* 133, *the Supreme Court of the United States* say of a franchise for banking when bought, "the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price." If by this was meant a *special legislative charge or imposition upon the franchise*, the correctness of the principle could not be denied; and if it meant a special tax, *technically speaking*, levied for the support of the government of *Maryland*, it would be void, as repugnant to 13th Article of the *Declaration of Rights of Maryland.*

If, as must be done, the *Supreme Court of the United States* are to be understood as speaking in reference to the *general tax*, laid upon *all* property within the State, under the act of 1841, ch. 23, then the proposition referred to, as asserted by that court, cannot be maintained.

A franchise as property, is, according to its value, liable to taxation for the support of government, whether paid for by a *bonus* or not.

The burden or bonus imposed by the charters, or acts reviving the charters of banks in *Maryland*, was not a tax upon the fair value of the privilege or franchise, when granted by the legislature, but the price to be paid or fine levied, for the right of exercising the powers and enjoying the immunities conferred by the charter. It was not a tax for the support of government.

No valuable consideration is necessary to the validity of a legislative grant.

The right of taxation is never presumed to be surrendered by the sovereign power; and such surrender is never made, unless it be the result of express terms, or necessary inference.

Under the true construction of the 18th Article of our Bill of Rights, we cannot presume that a franchise, if the subject of taxation, may, by its excessive exercise, be destroyed or rendered valueless.

This tribunal is bound to submit to the judicial decisions of the Supreme Court of the *U. S.* involving the true construction of the Constitution, treaties, and laws of the *U. S.* Yet there is no obligation on it to acquiesce in the *dicta* of that tribunal, not necessarily established by the matters by it adjudicated.

The charter of the *Baltimore and Ohio R. R. Co.*—act of 1826, ch. 123, sec. 18, declares that the shares of the capital stock of that Company shall be considered *personal* estate, and exempt from the imposition of any tax or burthen.

The State's right to tax that stock, and the right of all corporations created by the State to tax it, is excluded by the comprehensive and universal terms of the exemption.

Mayor and C. C. of Baltimore *vs.* Balt. and Ohio R. R. Co.—1848

The specific property of a corporation is as much an ingredient in the shares of its stock, and component part of their value, as is any portion of the corporate property. In the case of the *Baltimore and Ohio R. R. Co.* both are exempt from taxation.

The right to tax the stock or the specific property of the *Baltimore and Ohio R. R. Co.* was not re-invested in the State by the act of 1835, ch. 395, sec. 15.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, brought to *January* term, 1846, by the appellants against the appellees. The defendants pleaded *non-assumpsit*. A verdict was rendered for them, when the plaintiffs prosecuted this appeal.

At the trial of the cause, the plaintiffs, to support the issue on their part, offered in evidence the acts of the General Assembly of *Maryland*, and the Ordinances of the *Mayor and City Council of Baltimore*, relating to taxation in the State or City of *Baltimore*; and also the act of the General Assembly of December session, 1835, ch. 395.

The defendants, to support the issue on their part, offered in evidence their charter, passed at December session, 1826, ch. 123, and all the supplements thereto, and all the laws and ordinances of said City relating to the defendants.

It was admitted that the defendants owned real and personal estate, and shares of their own stock in the City of *Baltimore* that would be liable to tax, and the tax on which would amount to $100, except for the exemption claimed by them, and denied by the plaintiffs. It was admitted that the charter of the defendants has been assented to, according to its terms, by the States of *Pennsylvania* and *Virginia*, and by the *United States*, as legislature of the *District of Columbia*. It was admitted, that if in the opinion of the court, the stock in the hands of an individual holder would be liable to taxation, the judgment of this court shall be entered in favor of the plaintiffs for $101 and costs.

Whereupon, the plaintiffs prayed the court to instruct the jury:—

1st. That the real estate of the *Baltimore and Ohio Railroad Company*, the defendants, situate in the City of *Baltimore*, is liable for City taxes.

2d. That the personal property of the *Baltimore and Ohio Rail-road Company*, situate in the City of *Baltimore*, is liable for City taxes.

3d. That the capital stock of the *Baltimore and Ohio Rail-road Company*, the defendants, is liable for City taxes.

4. That the shares of the capital stock of the *Baltimore and Ohio Rail-road Company* in the hands of the share-holders, is liable for City taxes.

The court, (PURVIANCE, A. J.) refused to grant each and all of said prayers. The plaintiffs excepted.

It is agreed in this cause that the counsel may, in the appellate court, read from the printed volume of the Laws or Ordinances of the City of *Baltimore*, all such laws and parts of laws or ordinances as either may desire, for the purpose of argument or illustration, to have the same effect as if such laws, or parts of laws, or ordinances, had been set forth at length in the bill of exceptions.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By B. C. PRESSTMAN for the appellants, and

By JOHN H. B. LATROBE and REVERDY JOHNSON for the appellees.

DORSEY, J., delivered the opinion of this court.

The conclusive influence on the case before us, which, by the counsel of the appellants, has been attributed to the cases of *Gordon vs. The Appeal Tax Court*, and *Cheston vs. The Appeal Tax Court*, in 3 *Howard's Reports*, 133, &c., is not admitted. As grounds to support the opinion it gave, the Supreme Court say, that a franchise for banking, when bought, "the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price." And in the progress of its opinion, it also says that "the franchise is their (meaning the banks) corporate property, which like any other property would be taxable, if a price had not been paid for it, which the Legislature accepted as the con-

sideration for allowing them to use the franchise during the continuance of their charters. If in the first extract from their opinion, the Supreme Court meant a special legislative charge or imposition upon the franchise, the correctness of the principle could not be denied; and if it meant a special tax, technically speaking, levied for the support of the government of *Maryland*, it would be clearly unconstitutional and void, as being repugnant to the 13th Article of the Declaration of Rights, which declares "that every person in the State ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property within the State."

But if, as must be done, the Supreme Court are to be understood as speaking in reference to the general tax laid upon all property within the State under the act of 1841; then it is respectfully insisted, that the proposition referred to, as asserted by the Supreme Court, cannot be maintained; and that the franchise, as property, is, according to its value, liable to taxation for the support of government, whether paid for by a bonus, or not. In support of this judicial postulate of the legislative intent, as adopted by the Supreme Court, no authority has been referred to, and for it, no satisfactory reason has been assigned.

What was the burden or bonus imposed by the charters, or the acts of Assembly renewing the charters of the banks? Not a tax, in the appropriate sense of the term, upon the fair value of the privilege or franchise, when granted by the legislature; but the price to be paid, or fine levied by legislative discretion, for the right of exercising the powers and enjoying the immunities conferred by the charter. It was not a tax levied upon the franchise, or its value, after its creation, for the support of the government. If so regarded, it would be unconstitutional and illegal under the 13th Article of the Declaration of Rights. According to the true import of the term, it is no tax; but a price or condition, arbitrarily or discretionally fixed by the legislature as the consideration for its grant. The exaction of such bonus had no reference, and bore no analogy

to the transcendental power or right of the legislature to levy taxes for the support of government. It emanated from the exercise of no such power. It was the mere proposal or offer of a bargain or contract by the legislature, which might be accepted or rejected at the discretion of those to whom the offer was made. It bears not the semblance of resemblance to the rigid principles of taxation, where the sovereign will of the legislature, acting constitutionally, governs and commands every thing, leaving nothing to the discretion of others.

In granting such charters of incorporation, whether with or without a bonus, the legislature never, for one moment, suppose that they are in any degree impairing the State's eminent right of taxation; or that their acts could have the slightest bearing upon such a question. But for this decision of the Supreme Court, it might well have been supposed, both on reason and authority, that the right of the State to tax a franchise of value, which its legislature had granted to a corporation, was as undeniable where a bonus had been paid, as if the grant had been unattended by a bonus. No valuable consideration is necessary to the validity of a legislative grant. The intention of the legislature is the all-controlling principle by which the construction of its enactment is to be governed,—and nothing is more conclusively established, as well by the decisions of the Supreme Court of the *United States*, as by those of *Maryland* and of other judicial tribunals, than that the right of taxation is never presumed to be surrendered by the sovereign power,—and that such surrender is never made, unless it be the result of express terms, or necessary inference. The argument is wholly unsound when applied to *Maryland*, that a franchise, if subject to taxation, may by its excessive exercise be destroyed or rendered valueless; because by the 13th Article of the Bill of Rights, the legislature can impose no tax upon it which is not equally borne by every other species of property in the State, in proportion to its value. To infer that the legislature, by the exaction of a bonus, as the condition of a grant of corporate powers, had by implication divested itself of one of its most important rights of eminent domain,

is, to say the least of it, not an implication resulting from necessity. And it might with some show of reason, be contended, that the legislative exaction of a bonus, instead of evincing peculiar favor towards the corporation, and a willingness to make all concessions which might conduce to its benefit, or promote the accomplishment of its objects, rather evinces a contrary disposition.

From the aforegoing remarks, it must not be understood that there is in this tribunal the slightest disposition to withhold its full acquiescence and submission to the judicial decisions of the Supreme Court of the *United States*, involving the true construction of the Constitution, treaties, and laws of the *United States*—yet there is no obligation on this court to acquiesce in the *dicta* of the Supreme Court, not necessarily established by the matters by it adjudicated. As for example, this court is bound to conform and give effect to the judgments of the Supreme Court in the case of *Gordon vs. The Appeal Tax Court*, and *Cheston vs. The Appeal Tax Court*, reported in 3 *Howard*, 133. But it is not bound to admit the *dictum* in the Supreme Court's opinion, that by requiring a bonus for a charter of incorporation, the legislature surrenders its right to tax the franchise in common with all other property in the State; the judgments of that court in those cases being sustainable on other, and as appears to us, more obvious grounds: and in doing so, it is conceived that this court is supporting, rather than impugning, the Supreme Court's judgments in the case of *Cheston vs. The Appeal Tax Court.* The recital (in the court's opinion in that case) from the charter of the *Farmers and Planters Bank*, (the tax on the shares of stock of that bank owned by *Cheston*, being the ground of appeal in that case,) shows that a bonus was to be paid by the bank to the State of *Maryland* as the price of its charter; the recital stating that at the session of December, 1835, the *Farmers and Planters Bank* was incorporated. It was required to pay a bonus and school tax, but the charter contained no exemption from taxation. And notwithstanding the legislative exaction of bonus, the Supreme Court decide that the tax levied by the

State of *Maryland* upon the shares of the stock of that bank, was constitutional and valid. This decision, it is respectfully suggested, could not have been made consistently with the assumption, that the exaction of the bonus divests the State of the power of levying a tax, on the franchise conferred by the charter. The Supreme Court seeks to sustain this, its judgment, by declaring that this State tax upon the market value of the shares of bank stock, is no tax upon the franchise, but a tax upon the property owned by the bank. Is this declaration consistent with the fact? It is respectfully insisted that it is not. The question is at once decided by a moment's consideration, of what is, the market value of the shares of the stock of a corporation, the representative? What are the ingredients of which it is composed? It is not the mere value of the money and specific articles of property owned by the corporation; but the value of the shares it represents, as well the value of the franchise, as of the other property held under it. That the franchise is of itself property, is conceded by the Supreme Court, and at the present day could not be the subject of controversy. That the market value of the shares embraces the value of the franchise, is demonstrated by the notorious fact, that shares of stock frequently have acquired a market value before, by the exercise of the powers conferred by the franchise, the corporation has acquired any property under it. And in times past, it was no unusual thing to find the shares of stock in a corporation, selling in the market, for twice, three, or more than four times, the value of the shares of stock, if adjusted in reference to the property of the corporation, independently of the value of its franchise. It necessarily follows, that the value of the franchise, as a part of the property of the corporation, is embraced in the valuation of its shares of stock. Whilst entirely concurring, for other reasons than some of those assigned, in the matter adjudicated by the Supreme Court, in the case of *Cheston vs. The Appeal Tax Court*, this court does not feel itself bound to conform to a *dictum*, which, it is conceived, rather conflicts with, than sustains the judgment of the Supreme Court. And, therefore, it regards

the non-payment of a legislative bonus, by the *Baltimore and Ohio Rail-road Company*, as furnishing no stronger ground for an implication of a right in the State of *Maryland* to tax the franchise of the Company, than if it had paid a bonus therefor. But suppose the views expressed of the *dictum* referred to be erroneous, and that this court are to be controlled by it, as a conclusive adjudication by the Supreme Court, the case before us stands exempt from its influence. The Supreme Court have no where intimated, (on the contrary the reverse is the clear deduction from its opinion,) that to a corporation paying no bonus for its charter, the legislature of *Maryland* cannot grant an exemption from taxation. In the case now under consideration, it is conceived that such an exemption has been granted; the 18th section of its charter, the act of 1826, chap. 123, having declared that the shares of the capital stock of the said Company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden. And there is nothing in the charter of the *Baltimore and Ohio Rail-road Company*, or the terms and expressions in which it is couched, or in the objects designed to be accomplished by it, that would justify a construction of this exemption from taxation, as less comprehensive and universal than its terms would ordinarily import. It must, therefore, be held as an exclusion, not only of the State's right to tax, but of the right of all manner of corporations created by the State, within whose limits the Company may have either real or personal property.

But it is said, that although by the charter of the *Baltimore and Ohio Rail-road Company*, its shares of stock may be exempt from all taxation, yet that such exemption in no wise protects from taxation the specific articles of property of the Company. If such a specific property be deemed liable to the imposition of taxes, no sufficient reason can be assigned why the franchise should not be subject to the like imposition. It is as much an ingredient in the shares of stock, and component part of their value, as is any portion of the corporate property of the Company; and if under such an express legislative

exemption as that now before us, the one be exempt from taxation, so also is the other.

The design contemplated by the legislature in the insertion of this clause of exemption in the act of Assembly, was to confer a certain substantial, not a nominal benefit, on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise. To impute to the legislature, in the case before us, an intention to exempt the shares of the stock from taxation, and at the same time to reserve the right to tax every thing which constituted it a stock, and gave to it its value, would be gratuitously to cast an imputation upon the legislature, inconsistent with every principle of judicial courtesy. If, as has been contended, the legislature designed to retain the right of taxation upon the property of the Company, other than its franchise, it would have expressed its intention in terms about which there would have been no controversy; it would have limited its immunity to the franchise only, not to the shares of stock, which embraces every species of property owned by the company.

The effort made to restrict the immunity now under consideration to State taxes only, cannot be sustained. The terms used in its grant are so broad, unambiguous and universal, and the reasons for making them so accordant therewith, that their full and natural import must be given to them. The exemption covers County and City, as well as State taxes. There are no words used by the legislature qualifying or limiting the extent of the immunity conferred; it is therefore unlike the case of *Mayor and City Council of Baltimore vs. Gordon*, decided by this court at December term, 1847.

It is a matter of notoriety and of history, that in chartering the *Baltimore and Ohio Rail-road Company*, the legislature and the people of *Maryland* regarded the completion of the work as a great State object, tending eminently to promote the future wealth and prosperity of *Maryland*, and particularly of the City of *Baltimore*, and to contribute to the permanence of the union of the *United States*. They also were duly sensible that this gigantic and patriotic undertaking could not be

accomplished but at great expense and hazard of pecuniary loss to its undertakers. As an encouragement to the enterprise they were willing to confer on it every immunity, privilege and exemption which could reasonably be required, and tend to its completion. In expounding, therefore, those provisions of the charter of the Company, by which its expressed privileges and exemptions are imparted, liberal rules of interpretation for its benefit ought to be adopted to effectuate the benevolent designs of the legislature; and not such rules of restriction and limitation as should be applied to the charters of Companies incorporated for the peculiar benefit of their stockholders. To confine the exemption, "from the imposition of any tax or burthen by the States assenting to this law," to State taxes only, would not be consistent with the benevolent designs of the legislature. At that period there were no State taxes; and for their future imposition there then existed no apparent grounds of apprehension.

But it is insisted that conceding the exemption by the charter to have been as broad and comprehensive as it is asserted, yet that by the 15th section of the act of 1835, ch. 395, such exemption was regained by the State, by the stockholders of the *Baltimore and Ohio Rail-road Company* assenting to the provisions of that act of Assembly. The language of the 15th section is as follows:—"And be it enacted, that in case it shall be necessary at any time hereafter to levy a direct tax, for the support of Government, or to sustain the public credit, the same shall be laid according to the 13th Article of the Declaration of Rights, including all goods, wares and merchandise belonging to citizens of this State, ships or vessels in or out of port, monies at interest on mortgage bond or any chose in action, stock and public securities of every description, and all income derived from shares of every incorporated institution or otherwise, as well as every other description of property, real, personal or mixed, which escapes taxation under existing laws, and the faith of the State is hereby pledged to lay the same accordingly, in consideration hereof, and to provide for the payment of interest, and the reimbursements of principal,

of debts to be created in virtue of this act, or of debts which may be created at any subsequent legislature, and all acts, and parts of acts, in contravention of the constitutional and equitable principles herein contained, shall thenceforward be repealed, abrogated and anulled." By this enactment, it was certainly not the design of the legislature to impair the ability of the *Baltimore and Ohio Rail-road Company*, to comply with its stipulation of paying the six per cent. interest on the $3,000,000 of State bonds, issued for the benefit of the Company. It was not intended to confer new powers, not before possessed by the State, but to pledge the faith of the State to capitalists who might become purchasers of its bonds, that the powers of taxation already possessed by the State, should, if necessary, be exerted for their benefit, and not to their prejudice. Nobody, at the passage of the act of 1835, then doubted but that the receipts of the State from the profits of the Rail-road Company, would be greater than any amount of taxes it could derive from the shares of stock or property of the Company, when subjected to such taxation, according to the thirteenth article of the Declaration of Rights. And, consequently, it is apparent that the abrogation of the exemption contended for, would have depressed rather than enhanced the value of the State bonds. By the 15th section of the act of 1835, the additional property desired to be brought within the range of taxation, was that which escapes taxation under existing laws. And it would be almost a solecism to say, that property has escaped a taxation with which, constitutionally, it could by no possibility have been visited.

But there is a still more conclusive reason why this court should not adopt the construction of the 15th section of the act of 1835, contended for by the appellants. It would be a wanton and unwarrantable violation of judicial courtesy, in imputing to the legislature an intention to commit a flagrant violation of the Constitution of the *United States;* as, by sanctioning that construction, not only is the exemption of taxation withdrawn from the shares of stock of the *Baltimore and Ohio Rail-road*

Company, but also from the shares of stock of the old *Baltimore* banks, and many other corporations enjoying such an exemption, which might be mentioned. And that too, without in any way submitting to such corporations an opportunity of accepting or rejecting the provisions of the act of 1835. For such a judicial discourtesy to the General Assembly, in the case before us, no excuse or apology could be offered. To adopt a construction casting such an imputation upon the legislative intent, is never justifiable but in a case where the enactment is insusceptible of any other rational, legitimate, interpretation. Such, it cannot be insisted, is the condition of the 15th section of the act of 1835.

THE JUDGMENT OF THE COUNTY COURT IS AFFIRMED.

NEGRO STEPHEN CORNISH *vs.* JACOB WILLSON.—E. S., *June Term*, 1848.

Upon the trial of a petition for freedom, the petitioner offered in evidence the will of his master—proof of his identity, and his right to freedom, according to the terms of the will. The defendant then proved, that the executors took upon themselves the duty of administration; copies of their letters and bond; inventory of the personal estate, including the slaves; debts due the deceased; several administration accounts showing ultimately an over-payment by the executors, the negroes being still undisposed of, and charged to them at the appraisement. The defendant further proved an order of the *Orphans Court* directing a sale of the balance of the testator's personal estate, and an account of sales of negroes returned, including the petitioner, who objected to the admissibility in evidence, of the accounts of the executor, the order of sale of the *Orphans Court*, and return of sales by the executors, which objection was overruled. This was affirmed upon appeal.

That a petitioner for freedom is the same person mentioned in the will of a testator, declaring him free at a certain period, that he was the property of the testator at the time of his death, under the age of forty-five at the period specified for his manumission, able to gain a sufficient maintenance, will not authorize the court to instruct the jury that he is entitled to freedom where an insufficiency of personal assets to pay creditors appears, there being no evidence of the value of the testator's real estate—no means by which the jury could find its value—nor any charge upon the real estate of the testator to pay debts, either upon the true construction of the act of 1796, ch. 67, or

the will of the testator—nor jurisdiction to enforce a charge upon the realty for the payment of debts.

Upon a petition for freedom in a court of law, no evidence of the value of real estate can legally be submitted to the jury, or form a subject for its determination.

A devise of land to be sold by one's executors at a specified sum, and if it will not sell for that, not to be sold, does not constitute a charge on it, or its proceeds, for the payment of debts.

An order of the *Orphans Court* to sell the balance of a testator's personal estate, which included negroes, it being necessary for the payment of debts, does not restrict the sale of manumitted slaves to terms for years.

The terms in a will, "and after my debts and funeral charges are paid, I devise and bequeath," in legal effect at common law, charge the real estate of a testator with the payment of debts, in the event of there *not* being a sufficiency of personal estate to pay them, without a resort to slaves manumitted by the will.

But in Maryland, since the act of 1785, ch. 72, the insertion of those words in a will are immaterial and inoperative; that act renders the real estate in aid of the insufficient personalty, equally liable for the payment of debts, whether those words be contained in the will or not, or whether the deceased died testate or intestate. They are now of almost unmeaning form, and *rarely* of any import.

In the case of *Fenwick vs. Chapman*, 9 *Peters*, 461, if those words do make the debts of the testator *a charge* upon the realty, still it does not follow that it is primarily applicable to their payment.

The personal estate is the natural and primary fund for the payment of debts and legacies; and even where they are expressly charged upon the real estate descending or devised, the real estate is only to be resorted to as an auxiliary fund, after the personalty has been exhausted.

Upon a bill in equity to sell the real estate of a deceased debtor, on the ground that his personalty was insufficient, Chancery does not take testimony or receive admissions from the executor, that the real estate is sufficient for the payment of the debts of a testator, and, upon being satisfied thereof, ratify the exemption by the testator of his personal estate, adjudicate its disposition as directed by the will, there terminate its power, and leave the creditors to recover their debts as they may.

In case where slaves were manumitted by last will, and the personalty was not sufficient for the payment of debts, equity will suspend proceedings at law, which prevented the court of law from doing full justice to all parties; decree a sale of the real estate charged with the payment of debts, and apply the proceeds of sales to their satisfaction. Creditors being thus paid, the manumitted slaves could successfully prosecute their petition for freedom.

A testator, by exempting the whole, or any part of his personal estate from the payment of debts, cannot, at law, bar a creditor's suit against his executor. Such a bar can only be made available in equity when the intent of the testator may be carried out, and the interests of all concerned protected.

The case of *Fenwick vs. Chapman*, 9 *Peters*, 461, as decided by the *Circuit Court of the District of Columbia, and the Supreme Court of the United States*, objected to as not containing a correct exposition of the local law of *Maryland*, and not obligatory on this court.

The natural presumption, as to every testator, unless the contrary appears on the face of the will, is, that *all* his devises, bequests and directions, shall be gratified and conformed to. He assumes himself to be in a condition to make them; none have any preference, except by his intent. He is presumed to know the established principles of construction.

In a case of deficiency of assets, all specific have a priority in payment over general legacies. All specific legacies, in this respect, stand on the same footing, unless testator otherwise intended.

All debts and legacies are payable out of personal estate, and are only chargeable upon real estate by the will, either by its express terms, or necessary implication from its language.

The furnishing slaves manumitted, with a place of residence on the testator's property, and giving some of them annuities by the will, does not conclusively demonstrate the right to freedom in *Maryland*. Neither is the fact, that the manumitting terms are in strict conformity with our act, conclusive of the right to freedom.

By the act of 1752, ch. 1, the power of manumitting slaves by last will was taken away; the prohibition continued until a few years before the act of 1796, ch. 67, which latter act restored the right permanently.

A manumitting clause in a will must be construed in connection with the acts of Assembly.

Negroes, by will declared to be free from the death of the testator, or at any future time, are as regularly taken possession of, and held in bondage by the executor, and appraised at their full value, as slaves for life, and returned in the inventory as part of the property of the deceased, as they would be, if no clause of manumission had been inserted in the will.

If a petition for freedom were filed by such manumitted slaves, no court in *Maryland* would award their freedom—and thus release the executor—until the time had elapsed within which the creditors were warned to bring in their claims, and the executor was required to settle an account of his administration with the Orphans court; nor then, unless the court are not perfectly satisfied that the liberation of the manumitted slaves can work no prejudice to creditors.

The design of the legislature in declaring in the act of 1796, that manumission might be made to take effect at the death of a testator, or at any other period limited in his will, was not to indicate any priority in regard to such manumission, but to put an end to a doubt which then prevailed, whether a deed or will could give freedom to take effect in futuro.

If a testator by his will manumit his slaves, without naming any time at which they are to be free, they are entitled to freedom at the same time with those declared to be free at testator's death, and the same inferences and presumptions in their favor.

Unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts, it shall be taken subject to them.

An intention on the part of a testator to charge his real estate with the payment of debts, and exonerate specific legacies from that liability, does not result from the nature of manumission granted by his will.

The act of 1796, ch. 67, was to restore a power taken away by the act of 1752, ch. 1, and confer on a testator the same power to give by last will and testament the slave or his services, to the slave himself, that he previously enjoyed of making such a bequest to any other person.

An insolvent is one who has not property enough to pay all his debts.

In the event of a deficiency of the testator's assets for the payment of his debts, the executor, *under the direction of the Orphans court*, may if the creditors are willing to delay the payment of their claims, *hire out* the manumitted slaves, until the *hire of each*, as a specific legatee, shall raise his proportionate contribution towards the payment of debts; or he may *sell* the manumitted slaves for such length of time as shall be necessary to raise the amount of their respective contributions; or in the event of its being necessary for that purpose, he may sell the manumitted slaves as slaves for life.

Such proceedings of the Orphans court being *ex parte*, may be afterwards re-investigated, either at law, or in equity.

A charge on real estate for the payment of debts or legacies, is peculiarly the subject of equitable jurisdiction in *Maryland*, and of it a court of law can take no cognizance.

Manumitted slaves are the proper parties, complainants, to proceed in equity to enforce a charge on lands for the payment of creditors, and seek a sale of real estate—the proceeds of which should be applied to their exoneration. Equity, however, will not decree freedom.

The manumitted slave, then, by the executor's assent to the legacy of freedom, or by petition in a court of law, where the rights of creditor cannot interpose any barrier, may have his freedom secured by judgment.

The interpretation of the *S. C.* of *U. S.* to the case of negro *George et al. vs. Corse's Administrator*, 2 *H. & G.* 1, in 9 *Peters*, 476, not adopted by this court.

Appraisements of value of land are often uncertain and fallacious proof. An actual sale is higher proof.

An executor who, upon his own knowledge only, admits that lands charged with the payment of debts, are of sufficient value to satisfy the creditors—the personal estate being insufficient—permits the manumitted slaves of the testator to go free, and assents to their legacy of freedom, commits a *devastavit*, and is an incompetent witness to prove the facts necessary to justify his course.

Prior to the act of 1831, ch. 315, sec. 10, money coming into the hands of an executor or administrator from his sale of real estate for the payment of debts,

was not covered by the testamentary or administration bond. By that act, the law was changed.

In a court of law, equitable assets has no legal entity—are of no value—not recognized by it, and of them no cognizance can be taken.

Courts of equity only, prior to the act of 1831, could administer equitable assets.

If a creditor having two funds, to which he may resort for the payment of his debt, pursue in equity the fund to which only, another creditor has the right to resort; or if, under the like circumstances, he proceed to prove his debt under a commission of bankruptcy, equity will compel him to seek payment out of that fund, to which such other creditor had no right to resort.

But if one of the funds be *legal* assets, and the other equitable, and the creditor is pursuing the *legal* assets, equity will not strip him of his legal rights, marshal the assets, and oblige such creditor to seek payment out of the *equitable* assets.

On whom the burden of proof rests of proving the amount of debts—a sufficiency or insufficiency of assets, upon a petition for freedom.—*Qr.*

The case of *Allen vs. Sharp*, 7 *G. & J.* 96, explained.

The case of negro *George vs. Corse*, 2 *Harris & Gill*, 1, is fully entitled to the confidence of this court—was the unanimous decision of the judges who sat on that cause.

APPEAL from *Dorchester* County Court.

This was a petition for freedom, filed on the 22d October, 1846, by the appellant against the appellee.

The petition alleged that the petitioner is held in bondage by *Jacob Willson* of said county, and is claimed by him as his slave. The petitioner alleged himself to be free, and entitled to enjoy his liberty, and therefore prayed the court to grant him his freedom, &c.

The defendant pleaded that *Stephen Cornish* is not entitled to his freedom, &c.

1ST EXCEPTION.—At this trial of this cause, the plaintiff offered in evidence the last will of *Beachamp Harper*, late of *Dorchester* County, deceased, duly proved. This will contained, among others, the following devises:—

"Item. It is my will that all my just debts shall be truly paid by my executor.

"Item. I give and bequeath unto my wife, *Ann Harper*, &c. my bed and furniture, one grey mare, one cow and calf; her choice of all that I have.

"Item. I give to my daughters, *Mary*, *Betsey* and *Peggy*, one shilling each, in full of their part of my estate.

"Item. I bequeath unto my son, *William Smith Harper*, all my wearing apparel, excepting one fine hat.

"Item. I leave forty acres of land, joining *Daniel Layton*, to be sold, if it shall sell for forty-five shillings per acre—it being part of a tract of land called '*Leverton's Chance*,'—by my executors; and if it will not sell for that, not to be sold.

"Item. I bequeath unto my daughter, *Milly Harper*, seventy-five pounds, *to be raised out of my estate*, as her full part of my estate.

"Item. I leave *all my personal estate to be sold, and after my just debts are paid, to help to raise the seventy-five pounds* I have left my daughter, *Milly Harper*, as her full part.

"Item. I leave all my lands not mentioned, *to be rented out by executors*, until my son, *Edward Harper*, shall arrive to the age of twenty-one years,—and the money, all but a sufficiency to support my three smallest children; that is to say, *Beachamp Harper*, *Sarah Harper* and *Milly Harper*, to be put on interest until my daughter, *Milly*, shall arrive to the age of sixteen years, and then my son, *William Smith Harper*, to have the residue of the money and interest, after the aforesaid support, in full of his part of my estate.

"Item. I give and bequeath unto my daughter, *Sarah Harper, one negro boy, called Jacob*, in full of her part of my estate; provided, the said negro boy shall live as long as she; but should the said negro boy die first, after his decease, for my son, *Edward Harper*, and my son, *Beachamp Harper*, to pay her ten pounds a year during her natural life, and *at her decease, for said negro boy to be free.*

"Item. I give and bequeath unto my two sons, *Beachamp Harper* and *Edward Harper, all my land* that I now hold or possess, to be divided between them in quantity and quality, when my son, *Edward Harper*, shall arrive at the age of twenty-one years, to them and their heirs forever: and I do hereby constitute and appoint my son-in-law, *William Wheatly*, and my son, *William Smith Harper*, executors of this my last will, given, &c. 11th September, 1795."

N. B.—Before the signing, sealing, and delivery of these presents, the said *Beachamp Harper* doth set free, and to be at their liberty as followeth: one negro woman called *Leddy*, and one negro man called *David*, and one negro woman called *Taymer*, to be free 1st January, 1799, and one negro boy called *Thomas*, to be free 1st January, 1815, and one negro boy called *Stephen*, to be free 1st January, 1817, and one negro boy called *Jonathan*, to be free 1st January, 1820, &c.

Attested by three witnesses. Signed, B. H.

The will was admitted to probat on the 21st September, 1795. The will and annexed manumission being both proven by the subscribing witnesses.

The following affidavit, certified from the record of the Orphans court aforesaid, was also given in evidence:—

"DORCHESTER COUNTY, *Sct.*—On the 21*st September*, 1795, *Solomon Twyford*, being a new Quaker, did solemnly declare and affirm, that he was present at the late mansion house of *Beachamp Harper*, deceased, and at the time when the aforegoing instrument of writing was executed; and that he heard the testator, *Beachamp*, say, that negro *Leddy* and negro *David* were to be free at his death; and that he desired *Matthew Smith* to write his will in such words that they might be free immediately after his death,—and the rest of the negroes mentioned in the subsequent writing, to be free at the particular periods or times mentioned in said writing, immediately after their names respectively.

"Certified by JOHN GOLDSBOROUGH,
"*Register of Wills, Dor. County.*"

The petitioner further offered in evidence by *Wheyland Millican*, that the said petitioner was the property of the said *Beachamp Harper* at the time of making his said will, and at the time of his death—and that he is the same person mentioned therein: and also proved by *Solomon Robinson* and *Luke Messick*, that on the first day of January, 1817, the term at which the said freedom of the said negro was to commence, he was able to work and gain a sufficient livelihood and main-

tenance, and that he was under the age of fifty years; and also offered in evidence by *William S. Harper*, an admission of the said respondent, that the said petitioner came out of the estate of the said *Beachamp Harper*, and that he was willed free by the will of said *Harper;* but the law of 1796 would not let him take his freedom: and by *Luke Messick*, a further admission by the said respondent, that the said petitioner came out of the estate of the said *Beachamp Harper*, but was sold for the payment of debts; and on some other occasion, on account of the insufficiency of assets; and on one occasion, in passing, the respondent in conversation with others, heard him say simply, that he came out of said estate.

The defendant then offered in evidence, that the executors in said will took upon themselves, in due form of law, the administration thereof; and also offered in evidence an office copy of the letters of administration, of the administration bond of the said executors, to wit:—

The letters testamentary were granted on the 21st September, 1795; the administrator's bond dated the same day.

The defendant also offered in evidence the inventory of the personal estate, returned by the said executors to the Orphans court of *Dorchester* County, dated 11th April, 1796.

The amount of personal estate and debts due the estate, exclusive of negroes, amounted to	£478 4 2
The negro *David's* age, thirty-nine. *Taymer's* age, thirty-seven. Boy *Jacob*, nine years; one boy, five years; one boy, three years, and one boy, five months. Negro woman, *Leddy*, fifty-seven, ...	211 5 0
	£689 9 2

To which evidence of the respondent, the petitioner made no objection.

The defendant further offered in evidence the administration accounts of the executors mentioned—1, 2, 3 and 4, as follows, to wit:—

The *first* testamentary account, proved on the 1st May, 1797, included the negroes, £211 5 0—charged the executors with debts collected—showed disbursements allowed, £291 18 0, and a balance not accounted for of £464 7 10½.

The *second* account, dated 29th May, 1797, showed a balance, including the negroes, of £391 19 6.

The *third* account, dated 6th March, 1800, showed a balance of £287 4 8½.

The *fourth* account, dated 9th August, 1800, after charging the executors with the last balances, allowed them disbursements to amount of £326 18 11, showing an over-payment of £39 14 2;—the estate accounted for being £287 4 8½. The negroes being still undisposed of; their appraisement being charged to the executors.

The defendant also filed an order of the *Orphans court*, directing the sale of the balance of property of said *Beachamp Harper*, viz :—

"On application of *William Wheatly* and *William Smith Harper*, executors of *Beachamp Harper*, deceased, for a further order to sell all and singular the residue of the deceased's effects, to pay the creditors of the deceased, the court order that the said executors, without delay, proceed to sell at public sale, all and singular the residue of the goods and chattels of the deceased, to the highest bidder on the following terms:—

"Notice of such sale shall be advertised in writing, at the several places of worship, ordinaries, and other public places in the hundred, where the said goods and chattels shall be, and likewise in the two next adjoining hundreds, for the space of twenty days at the least before the sale, and the time and place of sale shall be mentioned in every such advertisement. Every purchaser shall be entitled to a credit of six months; but before a removal of the property, the purchaser shall give a bond, bill, or note, with security, if required, for insuring a punctual payment of the money, and a fair account of said sale, made out with two columns; one for the appraisement, and the other for the sale of each article, dated and subscribed by the clerk who vendued said effects, agreeable to the rules

of this court, and returned by the said executors to the next court succeeding the sale."

Also, a return of sales of certain negroes, the property of the said *Beachamp Harper*.

The defendant also offered in evidence the additional sales of part of the property of *Beachamp Harper*, late of *Dorchester* County, deceased.

	Appraisement.	Sale.
One negro man, *David*, .	£60 0*s.*	£58 0*s.*
" negro woman, *Taymer*,	50 0	45 0
" child, *Thomas*, . .	22 10	25 15
" " *Stephen*, . .	18 15	22 10
" " *John*, . .	10 0	10 0
" negro woman, *Lid*, .	25 0	7 10
	£186 5*s.*	£168 15*s.*

This report was dated 6th October, 1797, verified by affidavit, and certified as a true copy by the register of wills.

To the admissibility of all of which last mentioned papers, to wit: the accounts of the said executor, the order of sale by the said Orphans court, and the return of sales by the said executors,—the petitioners objected, and prayed that the same might be rejected: which said objection and prayer, the court (Spence, C. J. and Goldsborough, A. J.) overruled and admitted the same to be offered in evidence to the jury. The petitioner excepted.

2d Exception.—Upon the evidence in this cause, before the evidence excepted to in the first bill of exception was produced, the petitioner prayed the court to instruct the jury, that if they shall believe from the evidence in this cause, that the petitioner is the same negro *Stephen*, mentioned in the will of *Beachamp Harper*, and that he was the property of the said *Harper* at the time of his death, and that he was under the age of forty-five years on the 1st January, 1817, when his freedom was to commence, and that he was able to work and gain a sufficient maintenance and livelihood at that time, that he is entitled to his freedom: which prayer the said court,

(SPENCE, C. J. and GOLDSBOROUGH, A. J.) granted and instructed the jury accordingly.

Whereupon, after the said evidence excepted to in the first bill of exception was offered, and which is prayed to be made a part of this exception, the said petitioner further prayed the court to instruct the jury, that unless they shall believe from the evidence in this cause, that there was a deficiency of *personal and real estate*, to pay the debts of the deceased testator, that then the freedom given to the said petitioner by the last will and testament of the said *Beachamp Harper* was not in prejudice of creditors, and that they must find for the petitioner; if they shall also find the facts mentioned in the preceding instruction: *which last instruction* the court refused to give. The petitioner excepted.

3D EXCEPTION.—The petitioner prayed the court to instruct the jury, that unless they shall believe from the evidence in this cause, that the testator, *B. H.* did not leave estate, real and personal, sufficient to pay his debts, and that the manumission of the petitioner was in prejudice of creditors,—and if they shall further believe from the evidence, that the petitioner is the same negro, *Stephen*, mentioned in his said will, and was the property of the said *Harper;* that he was under forty-five years of age, and able to gain a maintenance and support by his labor on the 1st January, 1817, when his freedom was to commence—they are bound to find a verdict for him: which said prayer was refused by the court, (SPENCE, C. J. and GOLDSBOROUGH, A. J.) to which refusal the petitioner excepted.

4TH EXCEPTION.—The petitioner prayed the court to instruct the jury, that unless they shall believe from the evidence in this cause that there was a deficiency of personal estate, including legacies, and also a deficiency of so much of the real estate as was devised to be sold by the executors of the said testator, in the following clause of his will:—

"Item. I leave forty acres of land, joining *Daniel Layton*, to be sold, if it shall sell for forty-five shillings per acre—it being part of a tract of land called '*Leverton's Chance*'—by

my executors; and if it will not sell for that, not to be sold. That the manumission of said petitioner was not in prejudice of creditors,—and the said petitioner is entitled to his freedom, if they shall believe the facts stated in the first prayer of the petitioner, which is made a part of this: which said instruction the court, (SPENCE, C. J. and GOLDSBOROUGH, A. J.) refused to give. The petitioner excepted.

5TH EXCEPTION.—The petitioner prayed the court to instruct the jury, that if they shall believe from the evidence in this cause, that the said petitioner was willed to serve a term of years, to wit—till 1st January, 1817. Unless they shall further believe that he was expressly ordered to be sold as a slave for life, because of a deficiency of assets, they are bound to presume that he was sold only for the time which he had to serve; and if they shall further believe the facts mentioned in the first prayer, made a part of this, then they are bound to find for the petitioner: which instruction the court refused. Whereupon, the petitioner excepted.

6TH EXCEPTION.—The petitioner prayed the court to instruct the jury, that the clause in the will, in the words following, to wit:—

"Item. I leave forty acres of land, joining *Daniel Layton*, to be sold, if it sell for forty-five shillings per acre—it being part of a tract of land called '*Leverton's Chance*'—by my executors; and if it will not sell for that, not to be sold," was a charge upon the real estate to that extent; and that before the petitioner in this cause could be barred of his right to freedom, the defendant must show that the said land was offered for sale, and would not bring the sum specified therein; and unless they shall believe from the evidence in this cause, that the said land would not sell for that sum, that then the said order of the Orphans court was contrary to law, and is no evidence in this cause of the insufficiency of assets. This instruction the court refused, and the petitioner excepted.

7TH EXCEPTION.—The petitioner prayed the court to instruct the jury, that the order of the *Orphans court* offered in evidence in this cause, and the return of sale thereon not

specifying that the petitioner therein mentioned, was sold as a slave for life, or otherwise than for the term of years mentioned in the said will, is no evidence to rebut the claim of the petitioner to his freedom: which instruction the court, (SPENCE, C. J. and GOLDSBOROUGH, A. J.) refused to give. The petitioner excepted.

8TH EXCEPTION.—The petitioner prayed the court to instruct the jury, that unless they shall believe from the evidence in this cause, that there was a deficiency of personal and real estate, to pay the debts of the deceased, that then the freedom given to the said petitioner by the last will and testament of the said *Beachamp Harper*, was not in prejudice of creditors; and that they must find for the petitioner, if they shall believe the facts stated in the instruction heretofore given to them at the prayer of said petitioner, which is made a part of this: which instruction the court, (SPENCE, C. J. and GOLDSBOROUGH, A. J.) refused to give. The petitioner excepted.

The verdict being against the petitioner for freedom, he appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

By S. D. LECOMPTE, for the appellant, and

By JAS. A. STEWART for the appellee.

DORSEY, J., delivered the opinion of this court.

It being insisted that the reversal of the judgment before us is the inevitable result of the decision of the Supreme Court of the *United States*, in the case of *Fenwick vs. Chapman*, reported in 9 *Peters*, 461, it becomes our duty carefully to examine it in all its bearings, and to give to it that influence on the case before us, which the decisions of that elevated and learned tribunal ought always to exert over the judicial tribunals of the several States of our Union. From the nature of the matters in controversy, it is not, however, a case in which the Supreme Court have exercised its paramount judicial

authority, to which we are bound to submit and conform; but one which we may respectfully weigh and consider, and follow, or depart from, as our judgments may dictate. It was brought to the Supreme Court by a writ of error to the Circuit Court of the *United States*, for the County of *Washington*, in the *District of Columbia*, in which latter court, the defendants in error had filed a petition for freedom, (which they claimed under the will of *Frances Edelin*, of *Maryland*,) and obtained a judgment in their favor against the plaintiff in error, who claimed them as his slaves, having purchased them of the executor of the deceased, at a sale made by the order of the Orphans court of *Prince George's* County, in *Maryland*. It was in proof in the Circuit Court, that the slaves were sold by the executor, with all the other personal estate of the deceased, by the authority of the Orphans Court, as assets in the hands of the executor for the payment of debts—there not being enough to pay the same without the sale of the slaves, and without recourse to the real estate; *Edelin*, the executor, having purchased the slaves of *Fenwick*, by consent became defendant. The following facts were agreed to, and with the evidence in the cause submitted to the Circuit Court:—

"It is agreed in this case—1st. That the petitioners are the same named in the will of *Frances Edelin*, deceased, to whom she gave their freedom after her death, as appears by the said will, a copy whereof is hereto annexed.

"2d. That *Edelin*, the defendant, was the executor of the last will and testament of said deceased; as such, sold in the year 1833, the petitioners to the other defendant, *Fenwick*.

"3d. That the sale of the petitioners was made in *Prince George's* County aforesaid, where the deceased lived at the time of her death, and where the petitioners were; and that from the time of the deceased's death to the time of their sale, they were permitted by the executor to go at large as free; and that after the purchase made by *Fenwick*, he brought them to the *District of Columbia*, where the present suit was instituted; and that after the institution of the said suit, *Fenwick* transferred his claim to the petitioners to the defendant,

Edelin, who repaid him his money, and appears to defend the suit.

"4th. That the deceased left real estate to an amount in value more than sufficient to pay her debts, without the sale of the negroes emancipated by the will, as will appear by her will, referred to and made a part of this agreement, but not personal estate sufficient.

"5th. That the original copy of all the proceedings had in the Orphans Court of *Prince George's* County, relative to the settlement of the deceased's estate by her executors or administrators, may be filed as part of this case."

The Supreme Court, in its opinion affirming the judgment of the Circuit Court say, that *Frances Edelin's* will was dated in November, 1825, and that she died in the succeeding December: and immediately thereafter, the defendant, *Richard J. Edelin*, assumed the burthen and execution of the will; and that in virtue of an order of the said Orphans court, bearing date July 16th, 1833, to sell all the personal estate of *Frances Edelin*, passed on the petition of the executor, setting forth that *Frances Edelin*, by her will, had directed that certain negroes should be free at her death; and that he had discovered there were not assets enough, independent of those negroes, to discharge the debts of the testatrix. The petitioners were sold to the defendant, *Fenwick*. That the testatrix begins her will in the following words:—

"In the name of God, amen—I, *Frances Edelin*, of *Prince George's* County, in the State of *Maryland*, being of sound and disposing mind, memory and understanding, do make and publish this my last will and testament, in manner and form following:—

"First and principally. I commit my soul to the mercies of my dear Redeemer and Lord Jesus Christ, and my body to the earth, to be decently buried; and after my debts and funeral charges are paid, I devise and bequeath as follows:—"

Then follow sundry devises and specific legacies, and so much of the will relating to the freedom of the defendants in

error, and to the other persons manumitted by the will, is in these words:—

"Item. I give and bequeath to my nephew, *Richard James Edelin*, the small house and lot now occupied by *Robert Frazier*, which I give to him, his heirs and assigns forever, with this proviso, that the negroes which are hereinafter mentioned, to be free—to live in the back room of said house.

"Item. Negro woman, *Letty*, her daughter, *Kitty*—a mulatto, with her three children, to wit—*Eliza*, *Robert*, and *Kitty Jane*, with their future increase, and an old woman, named *Lucy*;—I do hereby declare them free at and after my death, and they shall have the right to live in and occupy the back room in the house and lot I give and bequeath to my nephew, *Richard James Edelin*. To the two old women, I give and bequeath $10 a year to each of them as long as they live; and $10 a year during two years after my death, exclusive of the year in which I die, to mulatto, *Kitty*.

"Item. My three nephews, *John Aloysius*, *Richard James* and *Walter Edelin*, for and in consideration of the bequests I have made them, shall pay every year to negro woman, *Lucy*, and to negro woman, *Letty*, $10 for every year the said negro women may live as mentioned in the foregoing item; and my nephew, *John B. Edelin*, for and in consideration of the bequests I have left him, shall pay during the two years above mentioned to mulatto, *Kitty*, $10 for each year."

The law of *Maryland*, permitting the manumission of slaves by will, is in these words:—

Act of 1796, ch. 67, sec. 13—"that from and after the passage of this act, it shall and may be lawful for every person or persons capable in law, to make a valid will and testament—to grant freedom to, and effect the manumission of any slave or slaves belonging to such person or persons, by his, her or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other periods as may be limited in such last will and testament; provided always, that no manumission hereafter to be made by last will and testament, shall

be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors; nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence."

Under the aforegoing circumstances, the court say, "the question to be decided is, were the defendants manumitted in prejudice of creditors? And we will first consider it by inquiring what effect the words, 'and after my debts and funeral charges are paid, I devise and bequeath,' have, to charge the real estate of the testator with the payment of debts, in the event of there not being a sufficiency of personal estate to pay them, without the manumitted slaves. Without any construction of our own upon these words, the effect of them to charge the real estate is settled, by decisions which are uncontested, and cannot be controverted." And a great number of *English* authorities are referred to in support of such a constructive charge. The establishment of this principle of the law of *England*, no lawyer at the present day could have the hardihood to deny; but if it were a new question, and courts of justice in that country were not, in their anxious desire for the protection of creditors, willing to lay hold of almost any thing to make real estate of a deceased debtor liable for the payment of his simple contract debts, as it is for those of a higher nature, and answerable in their entirety for both; it might well be doubted, whether such a principle could be sustained on the ground assumed for it, to wit—the intention of the testator deduced from the words referred to, as used in his will; as perhaps in ninety-nine cases out of a hundred, where the testator is not his own scrivener, they are the words of the scrivener, not of the testator, introduced as a mere formal part of the will, as to which the testator has neither been consulted or given any direction.

But in *Maryland*, since the act of 1785, ch. 72, the insertion of these words in a will are wholly immaterial and inoperative, as that act of Assembly renders the real estate in aid of the personalty equally liable for the payment of debts, whether those words be contained in the will or not; and whether the

deceased die testate or intestate. Since the act of 1785, in *Maryland*, therefore, no deduction as to any intention of the testator in relation to such a charge, can be deduced from them; they are words of almost unmeaning form in the introductory part of a will, and rarely of any import.

But what aid does it impart to the cause of the defendants in *Fenwick vs. Chapman*, if the words relied on do create a charge on the testatrix's real estate? The opinion of the Supreme Court furnishes no solution to such an inquiry. Although the words "relied on" in the will may make the debts a charge upon the realty, it does not thence follow that it is primarily applicable to their payment. In equity, it is well established that the personal estate is the natural and primary fund for the payment of debts and legacies, and even where they are expressly charged upon the real estate, descending or devised; and that the real estate is only to be resorted to as an auxiliary fund, after the personalty has been exhausted. For this unquestionable general principle—if authorities be necessary—they may be found in *Stevens* and *Stevens vs. Gregg*, 10 *Gill & John.* 147. *Simmons vs. Drury*, 2 *Gill & John.* 32. *Lupton vs. Lupton*, 2 *Johns. C. R.* 628, and 2 *Story's Eq. S.* 1246.

Proceeding in its opinion, the Supreme Court say: "but leaving out of view the words in the will, 'and after my debts and funeral charges are paid,' I devise and bequeath as follows:" And the authorities which have been cited to show that they make a charge upon the real estate for the payment of debts, would there not be a charge upon the real estate for the payment of debts, if it is manifest from the will that it was the intention of the testatrix, that the manumitting clause in her will was to take place, or to have effect at all events? The general rule is, that the personal estate of a testator shall, in all cases, be primarily applied in discharge of *his personal debts or general legacy*, unless he, by express words or manifest intention, exempt it. The testator may exempt a part of it by making it a particular legacy, or the whole of it, either by express words or plain manifest intention, by giving it as a specific legacy. And in support of this statement, a variety of

cases are cited; all of which are from Chancery Reports, and wholly inapplicable to the case then the subject of review in the Supreme Court, where the proceedings were at law, not in equity. In the tribunals of the latter, a testator may exempt his personal estate, or any portion of it, from the payment of his debts, by charging them upon his real estate—by a sale of which, they are to be satisfied. And the interests of creditors are abundantly protected by such equitable proceedings. They may be subjected to a temporary delay in the recovery of their claims, but all their just rights are preserved inviolate; to hazard or loss, they are in no wise subjected.

Upon the application of a proper party in interest to a Court of Chancery for relief, what is its course of proceeding? Does it, like the Circuit Court, take testimony or receive admissions from the executor; that the real estate is sufficient for the payment of the debts of the testatrix,—and upon being satisfied thereof, ratify the exemption of the personal estate; legalize or rather adjudicate its disposition, as directed by the will, and there terminate its exercise of power over the subject matter, and leave the creditors to seek the recovery of their just debts as best they may? It would cease to deserve the name of a court of equity, if with the powers it possesses, it would thus violate and trample upon the rights of creditors. Its course of proceeding would have been as widely different from that pursued by the Circuit Court, as justice differs from injustice.

It would, in the first place, upon the parties in interest appearing before it, have suspended all proceedings at law until all obstacles were removed, which prevented the court of law from doing full and equal justice to all parties. It would then have decreed a sale of the real estate charged with the payment of debts, and applied the proceeds of sales to their satisfaction or extinguishment. And if manumitted slaves were the persons seeking relief, from their freedom being withheld on the ground of unsatisfied creditors, the obstacle would have been removed, and the successful prosecution of their petition for freedom would be the necessary result. By such an appeal

to a Court of Chancery, both the manumitted slaves and the creditors are subjected to some inconvenience, by the temporary suspension of the gratification of their rights. But this is the result of necessity, and is the unavoidable tax imposed upon the parties, as the price of the attainment of full and equal justice.

We do not suppose that the object of the Supreme Court in citing this imposing array of equity cases, to prove that in bar of a creditor's pursuit thereof in a court of law, in a suit against the executor, the testator can, by express words or plain manifest intention in his will, or by giving it as a specific legacy, exempt the whole or any part of his personal estate, from liability for the payment of his debts. And yet it is somewhat difficult to comprehend for what other purpose such a citation was made in the case before it. But if such was the object of the Supreme Court, we must be permitted to dissent in toto from any such doctrine.

Neither in *England*, nor in this State—nor, it is believed, in any other State of the Union, where the principles of law and equity are administered by separate and distinct tribunals, and their distinctive jurisdictions exercised accordingly, unless it be by legislative enactment, can any such power be exerted by a testator. If attempted, it can only be made available by the interposition of a court of equity—the peculiar powers of which are such, that it can effectuate the intention of the testator, and protect the interests of all concerned, without unjustly or unreasonably impairing or controlling the rights of any.

A mere court of law possesses and can exert no such powers. To sustain this doctrine of the Supreme Court, no authority supporting it has been adduced; and it is believed that none can be found, or it would have appeared in the court's opinion, which is evincive of so much labor and research.

If we are right on this question of jurisdiction, and upon it we cannot conceive in what we have erred, it is manifest that the Circuit Court were in error in their decision of the case of *Fenwick vs. Chapman*, and the judgment of affirmance thereof by the Supreme Court, is obnoxious to the same infirmity.

But to proceed with the further examination of this opinion of the Supreme Court, it cites another case in equity of *Jones vs. Selby, H.* 1709, *Pr. in Ch.* 288, as proving that "where the testator's intention clearly appears, that a legacy should be paid at all events, the real estate is made liable on a deficiency of personal assets." "That such clear intention of the testator will charge the real estate, is also decided by authority."

"Was it clearly the intention of the testator that these defendants should be free at all events, so far as she had power to make them so under the law of *Maryland?* We think it was; and the conclusion is sustained by the words of the manumiting clause of the will, by the provision which she makes of a place for their residence—by the annuities which are bequeathed to some of them—the manner in which they are made; and above all, we say, by the nature of manumission itself. After naming the slaves her language is: "*I do hereby declare them free at and after my death; and they shall have the right to live in and occupy the back room in the house and lot I give and bequeath to my nephew, Richard James Edelin.*" And the devise of that house and lot to *Richard James Edelin*, (the now plaintiff in error,) is made with *this proviso*, "*that the negroes which are hereinafter mentioned to be free, to live in the back room of said house.*" "In confirmation, too, of its having been the intention of the testatrix, that these negroes were to be free at all events, it is worthy of remark, that the effective words of manumission are in strict conformity with, or a repetition in part of these words in the statute of *Maryland;* "and such manumission of any slave or slaves may be made to take effect at the death of the testator." "But the testatrix, after declaring these negroes to be free at and after her death, provides for them a residence; and the measure of her benevolence being unexhausted, she bequeaths to some of them annuities, or pecuniary legacies; two of them as charges upon her estate, and the rest she directs to be paid by her devisees and nephews, in consideration of the bequests she had made to them. Can it be supposed by any one, that such provisions would have been made by the testatrix for the manumitted

slaves, if it had not been her intention, that they should be free at her death at all events? We think that no one will answer the enquiry in the negative."

With great respect to the propounders of this interrogative, it is believed that without evincing any great degree of moral courage or hardihood, a negative answer might have been given to it. The natural presumption, as to the intention of every testator, unless the contrary appears upon the face of the will, is that all his devises, bequests and directions, shall be gratified and conformed to. He assumes himself to be in a condition to make them. In contemplation of law, no presumption arises, independently of what appears on the face of the will, that he designed the gratification of any one of his expressed objects or designs more than another, except that he is presumed to know, or his last will and testament is to be construed as if he did know the established principle of law; that in case of a deficiency of assets, specific have priority in payment over general legacies; and that all specific legacies in this respect, stand upon the same footing, unless otherwise provided for in the will by express terms, or resulting from an implication, so necessarily flowing from the provisions of the will, as to be tantamount to the use of express terms; and that debts and legacies are payable out of the personal estate, and are not by the will chargeable upon the real estate of the testator, unless by the express terms of the will, or an implication arising thereon, which is equivalent evidence of the testator's intention to make the charge, that the use of express terms for that purpose would be.

Let us now see what are the provisions in the will, which in the opinion of the Supreme Court, so conclusively demonstrate that the testatrix intended the legacy of freedom to her negroes, should take effect at all events; that is even although it might operate to defeat every other clause and provision in the will. The testatrix providing for them a place of residence, and giving some of them annuities by the will. Is it possible that circumstances so light and inconclusive, could have such an all-controlling influence on the will of the testatrix, and the

interests of those who were to have derived benefits under it? Might it not, with almost the same propriety, be insisted that if a testatrix gave by will, to a destitute relative, a room in one of her houses devised to another, and gave to her also annuities, that such provision made for this relative, must be secured to her "at all events," having priority over every other devise and bequests contained in the will?

The dangerous consequences, and utter uncertainty that would be introduced in the ascertainment of rights, derived under last wills and testaments, by the introduction of such latitudinarian principles of construction, must at once present themselves to the mind of every lawyer. But it is not unworthy of notice, that no annuities were given to either of the petitioners in *Fenwick vs. Chapman.*

Is it not perfectly rational to suppose, that the question as to priority between the devises and bequests in her will, never occurred to the mind of the testatrix, and not having formed any intention upon the subject, she designed no expressed or implied intimation thereof?

How any deduction can be drawn, that freedom, "at all events," was intended by the testatrix from the fact, "that the effective words of manumission are in strict conformity with, or a repetition in part of these words in the statute of *Maryland:*" "and such manumission of any slave or slaves may be made to take effect at the death of the testator," we are wholly at a loss to discover. By the act of 1752, ch. 1, the power of manumitting slaves by last will and testament, was taken away from slave-holders—which prohibition continued until a few years before the act of 1796, ch. 67, was passed—which latter act permanently restored the right.

When, therefore, a testator, acting under the authority conferred by the act, used a portion of the very words of the law, which bestowed the power under which he was acting, what possible inference can be deduced from it, but that he was manumitting his slave in accordance with the act of Assembly? Whether the slave was to be free "at all events," or on what terms his freedom was given, as far as concerned the

insertion of those words in the will, depended entirely upon the true construction of the act of Assembly.

Suppose the act of 1752, instead of prohibiting testamentary manumission, had prohibited all testamentary bequests of slaves, leaving them, as they would be, assets for the payment of his debts: and the act of 1796 had removed the prohibition, and given power to slave-holders to make such bequests, with the same proviso against prejudice to creditors, that is appended to the clause of testamentary manumission by the act of 1796; could it be successfully contended that such bequests carried rights and priorities to their legatees, which were paramount to the rights of other specific legatees of personal property bequeathed by the will? And not only so—but that without any expressions in the will sanctioning such a priority, it must be assumed as the intention of the testator that, if necessary for that purpose, every other clause and provision in his will must be defeated, and the whole of the testator's real and other personal estate must be applied to the payment of his debts, in order that the specific legatees of the slaves might be protected in the enjoyment of their legacies? We think such could not be the design of such an act of Assembly, nor the intention of the testator in making such a bequest under it. The proviso to prevent prejudice to creditors, was inserted from a superabundant anxiety for their protection, and to prevent any possible construction being given to the act of Assembly, by which the rights of creditors might be impaired. The office of a proviso as thus used, is not to enlarge or extend the operation of an enactment, to which it is appendant; but rather to qualify and restrain it. If we are right in regard to the construction that would be given to such a supposititious act of Assembly, we can see no reason why a like construction should not be given to the clause of the act of 1796, in relation to testamentary manumission.

The Supreme Court next say, "but without such assistance from a will to collect the intention of a testator, the nature of the thing directed to be done may clearly show that it is to be done at all events, so as to make real estate liable for the

payment of debts, on a deficiency of personal assets. As for instance, when the thing to be done cannot be partially performed by the executors, without defeating altogether the intention which directs it, and the thing itself. Manumission to take effect at the death of the testator, is of that character. What is manumission? *It is the giving of liberty to one who has been in just servitude, with the power of acting, except as restrained by law.* And when this liberty is given in absolute terms, by will, under the law of *Maryland*, it can only be defeated by the person conferring it, having done it in prejudice of creditors, or by standing in the other predicament of the law, of being over forty-five years of age, and being unable to work and gain a livelihood at the time the freedom given shall commence."

What is meant by this last recital from the opinion of the Supreme Court, we are not perfectly sure that we understand. If the meaning be, that upon the death of the testatrix, the manumitted negroes were freed from the custody and control of the executor, and entitled to go at large as persons entitled to their freedom, until the creditors should show that the manumission was to their prejudice, then we must be permitted to say, that such a construction of the act of 1796 is directly opposed to that which has been given to it, and been practised under it in *Maryland*, from the day of its passage to the present day. Negroes, by will declared to be manumitted from the death of a testator, or at any future time, are as regularly taken possession of, and held in bondage by the executor, and appraised at their full value as slaves for life, and returned in the inventory as part of the property of the deceased, as they would be if no clause of manumission had been inserted in the will. And if a petition for freedom were filed by such manumitted slaves no court in *Maryland* would award to them their freedom,—and thus release the executor from responsibility on their account, until the time had elapsed within which the creditors were warned to bring in their claims, and the executor was required to settle an account of his administration with the Orphans court: and not even then, if

without any default in the executor, the estate is so far unsettled, (as by the pendency of suits against it, or the inability to complete collections on account of it,) that the court are not perfectly satisfied, that the liberation of the manumitted slaves can work no prejudice to the creditors. Such a simultaneous construction of the act of 1796 having prevailed for upwards of fifty years, this court would not depart from it, but upon much stronger reasons than has yet been urged for doing so. For the, to us, novel principle, relied on as resulting from a legacy being made to take effect at the death of the testator, no authority has been produced. But if an authority be deemed necessary to prove the contrary, it may be found in 2 *Williams on Executors*, 979, where, in speaking of priority in the payment of legacies, it is stated, "but where the expressions are ambiguous, and do not mark with certainty the testator's intention, no priority can be allowed; therefore it is not sufficient that the testator gives a direction, as to a general legacy, to his wife that it shall be paid, immediately after his death, out of the first monies that shall be received by the executor: this will not give a priority to other general legatees."

The design of the legislature in declaring, "that such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other periods as may be limited in such last will and testament," was not to indicate any priority in regard to such manumissions; but to put an end to a doubt which then prevailed, whether a deed or will could give freedom to a slave, to take effect in futuro. If a testator, by his will, manumit his slaves, without naming any time at which they are to be free, they are entitled to their freedom at the same time with those declared to be free at the testator's death, and to the same inferences and presumptions in their favor.

The Supreme Court have labored at great length, and by a reference to a host of authorities to prove that the testatrix's land is subject to a charge for the payment of debts. But that is not sufficient, in any degree, to sustain the deductions drawn from it in favor of the defendants in error;—such a charge

being in its nature, merely auxiliary to the personal fund. It must be shown that it is chargeable with legacies also; or at least that it is primarily liable for debts, to the exoneration of this legacy of manumission. What is required to charge the realty, to the exemption of the personal estate in equity, is distinctly stated in one of the cases referred to by the Supreme Court. *Burton vs. Knowlton*, 3 *Vez.* 107. "I need not state the principles which have been so often commented on, and are so fully laid down in the *Duke of Arcaster vs. Mayer*, that unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts; it shall be taken subject to them." Where is this "demonstration plain," of such an intention in the will of *Mrs. Edelin?* We have endeavored to shew that it is not to be found in the slight circumstances relied on as showing it. But say the Supreme Court, it necessarily results from the nature of testamentary manumission itself, under the act of 1796. In this assertion, we cannot concur. Correctly to determine the issue between us, it is necessary to ascertain what was the object of the act of 1796, in authorizing testamentary emancipation? It was not to over-ride, defeat, and control all other powers and intents possessed by the testator—and all rights of other persons possessed *aliunde*, or acquired under the will—but simply to restore a power taken away from him by the act of 1752, ch. 1, and to confer on him the same power to give by last will and testament, the slave or his services, to the slave himself, that he previously enjoyed of making such a bequest to any other person.

To give to this emancipating power under the act of 1796, its true construction—that to which it was entitled at the date of its passage—we must bear in mind that slavery is one of the civil institutions of *Maryland*, and that its previous acts of the legislature upon the subject, sedulously protected the interests of slave-holders; and that whilst it tolerated emancipation, under special guards, limitations and restrictions, it evinced no disposition to encourage its extension: it conferred

no new favors or immunities upon the liberated slaves, or their former masters. All that the legislature designed by that part of the act of 1796, which relates to the manumission of slaves by last will and testament, was to relieve it from the prohibition imposed on it by the act of 1752. It intended to confer on it no other or greater mark of its favor. That such transcendental priorities, presumptions and rights were, by the act of 1796, or the intention of those who exercised the powers derived under it, granted to testamentary emancipation, is a discovery of more modern times, and never entered the imagination of the General Assembly, by which the law was passed, or of those who acted under it. If such feelings and intentions are to be imputed to testators, the evidence thereof would have appeared by express terms in the will; or what would be more natural and consistent, by deeds of manumission, executed in their life-time.

"But (say the Supreme Court,) what meaning shall be given to the words of the statute of *Maryland*, that no manumission hereafter to be made by last will and testament, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors? It is, that the manumittor must not be insolvent."

If such had been the meaning of the legislature, it would have used apt words to express it. Instead of the language used in the law, the enactment would have been somewhat as follows: provided that no insolvent person shall manumit his slaves by last will and testament. Such was not the meaning of the General Assembly; if it were, in what a deplorable condition would it leave creditors. An insolvent is one who has not property enough to pay all his debts. A testator then, under this new interpretation given by the Supreme Court to our *Maryland* act of 1796, who owned negroes worth $10,000, and $100 worth of other property, and owed debts amounting to $10,000, not being insolvent, might manumit all his slaves, and no protection or proviso whatever was contained in the act of 1796, for the benefit of creditors. Can it for one moment be believed, that such was the intention

of the legislature, or the true interpretation of its enactment? But if it be suggested that we misinterpret the meaning of the Supreme Court in its use of the word insolvent, that its meaning was, in the use of that term, that the testator's property, exclusive of the manumitted slaves, was not sufficient to pay his debts,—and therefore he had no power, under the act of 1796, to manumit his slaves. By such a construction, the power of testamentary manumission would be greatly curtailed; and hundreds and hundreds of those who are legally enjoying their freedom under the exercise of that power, would now have been slaves.

As for example, if a testator owned negroes, whom he manumitted, worth $10,000, and other property to the amount of $50, and owed debts to the amount of $100, his manumission of slaves was void, although the executor, by the hire of the negroes for a few months, might have paid off all the debts of the testator. In the event of a deficiency of the testator's assets for the payment of his debts, the executor, under the direction of the Orphans court, may, if the creditors are willing to delay the payment of their claims, hire out the manumitted slaves, until the hire of each, as a specific legatee, shall raise his proportionate contribution towards the payment of debts; or he may sell the manumitted slaves for such length of time as shall be necessary to raise the amount of their respective contribution; or in the event of its being necessary for that purpose, he may sell the manumitted slaves as slaves for life. And this construction of the powers of the executor, is not only required for the protection of creditors, but is essentially beneficial, and just, towards the manumitted slaves themselves. These proceedings of the Orphans court being *ex parte*, their legality is always open for examination, when they are relied upon, either in a court of law or of equity.

The numerous inconsistences and disastrous consequences which the Supreme Court has enumerated, as resulting from any other construction of the act of 1796, than that which they have given to it, exist but in imagination, and are all removed

by the construction which we have given, by which the rights of all parties are secured and protected.

The act of 1796 does not require, and it was not necessary to effectuate any object of its framers, that it should require, that where real assets are charged with the payment of debts, either as a primary or auxiliary fund, and slaves are manumitted by the testator, that he should be compelled to file a bill in Chancery for a sale of the real estate. How can he allege that he is remediless without the aid of a court of equity, when his remedy at law is available and complete. But this allegation may with truth be emphatically made by manumitted slaves, where such charge has been made, and they are about to be sold for the payment of debts, which in equity ought to be paid out of the realty. A charge on real estate for the payment of debts or legacies, is peculiarly a subject of equitable jurisdiction in *Maryland*, and of it a court of law can take no cognizance. The manumitted slaves, then, are the proper party complainants to go into a court of equity to enforce the charge, and seek the sale of the real estate—the proceeds of which should be applied to their exoneration. Upon their application, the court of equity will, if necessary, arrest the arm of the pursuing creditor at law, decree the required sale, and apply its proceeds to the satisfaction of the testator's debts; and then do what? not decree that the manumitted slaves shall be free and discharged from bondage. To do this, a court of equity has no more power than the Orphans court. But the manumitted slave is left to either one or the other of the only two ways, by which his right to freedom can be consummated. Obtain the assent of the executor to the legacy of freedom, which has been bequeathed to him, or file his petition in the County Court as a court of law, where the rights of creditors having ceased to interpose any barrier to his claim, his freedom will be secured to him by the judgment of the County Court. By such a course of proceeding, justice will be done to all parties concerned; the just rights of all amply provided for and protected, and all the objects of

the act of 1796, in relation to testamentary manumission, fully carried out and accomplished.

In a further part of its opinion, the Supreme Court say—"the decision in the case from 2 *Harris & Gill*, 1, of negro *George et al. vs. Corse's administrator*, was urged in argument, in opposition to the opinions just expressed. In that case, the petitioners claimed their freedom, in virtue of the will and testament of their master, *James Corse*. The manumitting clause of the will gives freedom to some of the slaves at the testator's death, and to others when they shall have arrived at particular ages; and the testator further says, if his personal estate, exclusive of the negroes, should not be sufficient to discharge all his just debts, then my will is, that my executor or administrator, as the case may be, may sell so much of my real estate as may pay my debts, so as to leave my negroes free, as before stated." "The testator made specific devises of real estate in fee to his son,—and devises and bequeaths to his brother, *U. Corse*, the residue of his estate, both real and personal, with the unexpired time of the negro girls and boys, as designated in the first clause of the will, and he appointed *U. Corse* executor. The case was submitted to the jury in the *Kent* County Court, upon a statement of facts; and with instructions from the judge, that if the jury believed the facts, they must find a verdict for the defendant. The verdict and judgment being against petitioners, they appealed. In the statement of facts, it is admitted that the personal estate of the testator, either including or excluding his negroes, was not, at the time of the execution of his will, nor at any time after, sufficient to pay his debts—but that his real estate, exclusive of the negroes, was sufficient to pay all his debts and funeral charges."

"Upon appeal, three judges decided to affirm the judgment, upon the ground, that the question of the existence of a sufficiency of real assets to pay the debts of the testator, never can be tried as an issue between the executor or administrator only, without prejudice to creditors. That it was an issue to which the creditors were no party, and to protect whose in-

terest nobody appears. And the court further says, that the admissions made by the appellee, he was unauthorized to make, and the court incompetent to pass judgment upon the facts they contained—not being matters in issue in the cause."

The court further say, "as far as relates to the personalty, the executor or administrator is competent to act for all concerned; but in trying the facts, whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest, either personally, or in right of representation." With all due respect for the judges deciding that cause, their opinions cannot command our assent.

"We think with Judge *Cranch*, and use his language in regard to that decision, when he gave his opinion in the Circuit Court in that case. The judge says: "when lands are devised to the executor, to be sold for the payment of debts, as when the power is given to the executor to sell them, the lands are as much a fund in his hands for that purpose, as the goods and chattels; and he represents the creditors, in regard to the lands, so far as their interests are concerned, as much as he does in regard to the personal estate,—and the creditors are as much a party in the issue in respect of the lands, as they are in respect of the goods and chattels. When he is charged with the sale of his testator's lands for payment of his debts, he is as much bound to inquire in regard to the lands, as he is in regard to the personal estate; for it is his duty to execute the whole of his testator's will,—and in such a case, the creditors have as good a right to look to the land, through him, for the payment of those debts, as they have to look to the goods and chattels through him."

If it were the design of Judge *Cranch*, as from the portion of his opinion quoted, we should be disposed to infer that it was, or how was it evidence of the error in deciding it, to state that the lands charged were either as lands—or as money, the proceeds of the sale thereof a fund in the hands of the defendant, the administrator of *Corse*, we must be excused for saying, that such an assumption is wholly unwarranted by the admission of facts in the record of that case. *Thomas C. Kennard*, the

administrator of *Corse*, the testator, was the defendant,—and there was no devise to him of any lands to be sold for the payment of debts, or any other purpose; nor was there any admission or proof that he had ever been in the possession of any lands of the testator, or of the proceeds of the sale thereof, or that any attempt had ever been made by him, or any body else, to sell the testator's lands for the payment of his debts. How then, either at law, in equity, or in fact, can it be said, that the lands or real estate are assets in his hands for the payment of debts; he possessed but a naked, unexecuted power, and could only be chargeable by its execution. The Supreme Court proceeds, by many supposititious cases, to sustain this adopted opinion of Judge *Cranch*, to the imputed effect of none of which *in proceedings at law*, can we yield our assent. And as an argument, which it appears to consider as established by its statement, it says: "but it may be said the difference in the cases supposed, and that which existed is, that in the first the assets were in hand, and in the other, were to be made by a sale of the land. The difference makes nothing against the argument; for the value of the land can be as well ascertained by proof as it can be by the executor's sale; and when he admits the value to be sufficient to pay debts, he does, in truth, do no more than is done when he admits the existence of a sufficiency of personal assets, but unsold to pay debts."

"As between himself and another, his admission may surely bind him in that other's favor, as well in regard to assets to be made from land, as in regard to personal assets undisposed of. In the latter case, there is as much a question of the sufficiency of assets, as there is in the case when assets are to be made by the sale of land; and so far as creditors are concerned in a case of manumission, the reason for not trying the issue between a petitioner and an executor, is as strong in an inquiry of sufficiency of personal assets, as in one of real assets."

To these results, the reasoning of the Supreme Court necessarily led,—and if its premises were true, and its conclusions warranted by them, they would establish some novel, extraordinary, and startling propositions.

"The difference," (says the Supreme Court,) "makes nothing against the argument, for the value of the land can be as well ascertained as it can be by the executor's sale."

If this be true, then an execution levied upon property, valued by sworn appraisers at the amount of debt and costs, though it subsequently sell at but half the amount, is as much a full satisfaction of the creditor's demand, is as beneficial to him, as if the whole amount had been realized, or received from the sale of the property seized. Does not every day's experience demonstrate that nothing is more uncertain and fallacious than the estimated value of land to be sold at public auction? The records of Chancery sales, and sales under executions from courts of law, and the testimony frequently offered in relation to them, demonstrate the truth of this assertion. Are not the rights of a creditor impaired? Is he not prejudiced? If, instead of being paid the amount of his debt, or the amount thereof actually realized by the sale of the lands charged with its payment, he is stripped of his legal rights upon a fund which he knows to be sufficient, and left as his only security to pursue a fund which may, or may not, produce enough for the satisfaction of his claim, upon the proof of a witness or witnesses that in his or their opinion upon a public sale, it will not prove inadequate. To what does the admission of the administrator amount? Nothing more than the mere expression of his opinion. And should he ultimately sell the lands and be called to an account in a court of equity, for what would he be held accountable? For the price at which the lands sold, and nothing more. And this statement of the administrator, not made under oath, is regarded as sufficient proof to establish a matter of fact by which creditors may be prejudiced, their legal rights taken away, and their equitable rights, if they have any, greatly impaired. For such an invasion of the legal rights of creditors, even by a court of equity, it is believed no precedent can be found. But this is not all. From whom have the Supreme Court received this statement, which, though not under oath, it regards as proof sufficient to destroy the rights of creditors? From one who, if offered as a witness, would

not be listened to for a moment. By the declared opinion of the Supreme Court, he has assented to the bequest of freedom to the slaves, and can never afterwards reclaim them. And what is the necessary result of such an act of the administrator, if he fail to establish the fact of his alleged justification as now offered to be proved by himself? Why, that, as regards creditors, he has committed a *devastavit* to the amount of the value of the manumitted slaves, can a more conclusive and undeniable objection to the competency of such a witness be well imagined?

"And (say the Supreme Court) when he admits the value to be sufficient to pay debts, he does, in truth, do no more than is done when he admits the existence of a sufficiency of personal assets, but unsold, to pay debts."

Unquestionably true it is, that he does no more; but, as we conceive, he does much less. In the first case, *ex natura rei*, he merely expresses an opinion, for the consequences of which no court of equity would ultimately hold him responsible, and for which neither he nor his securities on his testamentary bond, could be held answerable. But, in the second case, the assets are in his hands, it was his duty to have sold them, to be prepared to make them available to the payment of the debts of the testator. And the law presumes that he has done his duty, and that the personal assets are in his hands accordingly, and receives his admission in accordance with the presumption. If it be not so, he is guilty of misfeasance, and by his admission, charges both himself and his securities in his testamentary bond, with the consequence resulting therefrom. That is, both he and his securities are liable to the creditors, as for a *devastavit*, to the extent to which the creditors were prejudiced by reason of the admission. On the contrary, the statement of facts agreed on, repels any presumption that the administrator, the defendant, is, or ever was, in possession of any part of the real estate or the proceeds of sale thereof, or that any portion of it ever was sold, or attempted to be sold, for the payment of debts. His admission, therefore, could not be otherwise regarded, either at

law or in equity, than as his opinion of the value of his testator's real estate, then in the hands of his devisees.

But suppose it were otherwise, and he had admitted that he had sold the real estate, and that he was chargeable with the proceeds of sale. Is it not a prejudice to creditors to lessen the securities they have for the payment of their debts? To take from them a fund, the faithful application of which to the payment of their debts, is secured not only by the responsibility of the defendant himself, but of the two securities in the testamentary bond, and to leave them to seek satisfaction of their claims from a fund, for which the defendant's ability to pay is their only security? We think it is. That money, thus coming into the hands of the executor, or administrator, from his sale of real estate for the payment of debts, is not covered by the testamentary or administration bond, cannot be denied. To prove that such was the law of *Maryland* anterior to the year 1831, when, by statutory enactment, the law was changed, it is only necessary to refer to the act 1831, ch. 315, sec. 10.

But another and a conclusive reason why, in a proceeding in a court of law, (of which character is a petition for freedom,) the admission of an executor, or administrator, as to the value of real assets charged with the payment of debts, cannot be regarded as a ground for adjudicating the freedom of slaves, is because such real estate, whether in the hands of the executor or administrator, or not, and whether sold and in the hands of the executor or administrator, or not, is equitable and not legal assets, which in a court of law has no legal entity, and is of no value; is not recognized by it; and of it no cognizance can be taken. Courts of equity only, previous to the year 1831, could administer equitable assets; there only could their value be estimated; and there only could they be sought, or remedies be prosecuted against them. For this principle, it is deemed unnecessary to refer to the numerous authorities that might be arrayed for its establishment, and we are content to extract a few lines upon the subject from the 2d vol. of *Williams on Executors*. In page 1196, in speaking of legal assets, that learned writer describes them as being "such as may be

reached at law, and such as a creditor, suing the executor in an action at law for a debt due from the testator, might bring forward, in evidence, on an issue joined on the executor's plea of *plene administravit.*" In speaking of equitable assets, he says they "are not recognized as assets at law." "That legal assets are such as are liable to debts in the temporal courts and legacies in the spiritual, by course of law; equitable assets are such as are liable only by the help of a court of equity." And in page 1198, of the same writer, it is stated, "with respect to that portion of the estate of an executor, or administrator, which consists of the proceeds of sale of real property, it is now fully settled, that such proceeds are equitable, not legal assets."

On whom the burden rests of proving the amount of debts, or sufficiency, or insufficiency of assets, on a petition for freedom, it is unnecessary for us to express any opinion. The admissions of the parties, or full proof in all the cases before us, and to which we have adverted, having occluded the consideration of any such questions.

If we rightly understand the doctrines asserted by the Supreme Court in *Fenwick vs. Chapman*, a slave whose manumission by the terms of the will is to take effect at the testator's death, may forthwith file his petition for freedom in the County Court, and that judgment must be awarded in his favor; if, on the trial, it be proved to the satisfaction of the court or jury, as the case may be, that the testator left other personal and real estate, no matter how, or to whom bequeathed or devised, sufficient for the payment of his debts; although it might subsequently happen that the testator had no title to such real or personal property; or that upon a subsequent sale of it, the proceeds of sale might not be a tythe of its value in proof to the court and jury on the trial of the petition for freedom; and that such proceedings and results are not in prejudice of creditors within the true intent and meaning of the act of 1796; because the judgment of the County Court liberating the slaves, may be set aside, if obtained, "without foundation in fact, or in fraud, or mistake, upon the creditor's showing either, in a

proceeding in equity to which the manumitted slaves, the executors, and all persons interested have been made parties in which there may be a review of the entire administration of the estate, of the conduct of the executor, and that of creditors in regard to the estate, and in regard to the vigilance of the one in payment, and of the others in the pursuit of their debts." What was the alternative showing of the creditors, indicated by the court's use of the word "either," is not stated in the report of the court's opinion in 9 *Peters*, and we have no means of ascertaining what it was. Whether such a judgment could be vacated with the certainty and facility with which it appears to be thought that it could be done, it is deemed unnecessary to inquire; our design is only to examine the effects of such vacation upon the rights of creditors. If regarded theoretically and as a judicial abstraction, it might perhaps be esteemed as healing the wounds inflicted on the rights of creditors by the judgment of the County Court, emancipating the petitioning slaves. But if practically considered, it is stripped of all its conservative influence on the rights of creditors, who by the proceedings of the County Court, are not only prejudiced, but have had all hopes of payment of the unsatisfied portions of their claims virtually extinguished. To prove this, all that is necessary is to state what, in point of fact, are the effects of the vacation of the judgment complained of; and what were the anticipated results. The latter were, that the emancipated negroes would be again restored to the possession of the executors, and be applied to the payment of the debts of the creditors. The former are, that the manumitted slaves having fled from the State of *Maryland* to some place of perfect security against the reclamation of the executor, will never be made available for the claims of creditors; but forever remain in the enjoyment of their freedom, unlawfully obtained, "to the prejudice of creditors," and in contravention of the manifest intent of the act of 1796. That the executor and his securities, under such circumstances, would, both at law and in equity, be exonerated from all accountability for the manumitted slaves, or their value, it surely cannot be necessary to assert.

The legislature, in passing laws, are not governed by mere theories or legal abstractions, but are presumed, as men of experience and judgment, to foresee the natural and probable consequences of their enactments. If so, could it for one moment have deen doubted that upon the creditor's filing a bill for the annulment of the judgment of the County Court, and the summoning and apprising of the manumitted slaves to answer the bill, when in possession of such testimonials of their right to freedom as would have protected them from arrest or molestation in a journey to any part of the world, that the petitioners would not at once have taken their flight to some remote place of security, from which their reduction to a state of slavery was out of the question. It never was the design of the General Assembly, therefore, by the act of 1796, thus to prejudice the rights of creditors, by legalizing the proceedings complained of. It must be assumed of the General Assembly of *Maryland*, that it foresaw such consequences of its enactments, as were to have been anticipated upon principles of plain reason, common sense and ordinary experience. With such an assumption, we conceive the interpretation, given by the Supreme Court, to the act of 1796, cannot be reconciled.

The Supreme Court further say: "This construction too, of the words 'in prejudice of creditors,' and of obligation to go into a court of equity, is in exact conformity with that indisputable rule in equity: that, where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien." And for this a number of authorities are referred to, which are incontrovertible in a court of equity; but, as we conceive, are wholly inapplicable to a trial at law, as was the case of *Fenwick vs. Chapman*. None of them were decisions made in trials at law, but in those of a Court of Chancery, whose peculiar and exclusive province it is to marshal assets. The decisions above referred to, are, in our interpretation of them, nothing more than instances in which this exclusively equitable power has been exerted. If a creditor, having two funds to which he may resort for the payment of his debt,

pursue in equity the fund, to which only another creditor has a right to resort; or if, under like circumstances, he proceed to prove his debt, under a commission of bankruptcy, a Court of Chancery will compel him to seek payment out of that fund, to which such other creditors had no right to resort. But if one of the funds be legal assets, and the other equitable assets, and the creditor is pursuing the legal assets, can a case be found where the Court of law have said, we will strip you of your legal rights, and exercising the powers of a court of equity in marshaling assets, put you to seek payment of your claim out of the equitable assets. For such an exercise of power by a court of law, either in *England*, or in *Maryland*, it is confidently believed that no precedent or authority can be found. In all such cases, or in cases of specific legatees, who are about to be deprived of their bequests, by creditors seeking payment out of the legal, instead of the equitable assets, the controlling interposition of a court of equity, is applied for, not as appears to be supposed, by the *creditor*, but by the party about to be injured by the legal remedies pursued by the creditor. This is the natural order of things; and by pursuing such a course of proceeding, no "prejudice to creditors" ensues, and the rights of all parties interested are asserted and protected.

In the case of *Fenwick vs. Chapman*, the petitioners, if the real assets were primarily liable for the payment of debts, instead of filing their petition for freedom in the County Court, ought to have filed their bill in the Court of Chancery against the executors and heirs, or devisees, as the case might be, and some of the creditors of the testatrix, to obtain a sale of the real estate for the payment of debts. By such a proceeding, the rights of all parties would have been secured, and loss or injury inflicted on nobody.

The case of *Allien vs. Sharp*, 7 *G. & J.* 96, decided nothing in relation to rights acquired under testamentary manumissions. There, the manumission was by deed duly executed, acknowledged and recorded; and the rights of creditors could not be prejudiced, unless the deed was fraudulent and void, as against

creditors; that is, persons who were creditors at the date of the deed of manumission, and who in consequence thereof, were deprived of all means of making their debts out of the property of the debtor. If at the time of its execution, the debtor was entitled to other property, amply sufficient for the payment of all just claims against him, his creditors were deprived of no legal right of which the debtor had not an unquestionably authority to divest them at any moment he saw fit, either by deed of manumission, or any other mode of disposing of the slave, that he might deem it expedient to adopt. And if the manumitting debtor had not sufficient property remaining to pay all his debts, the deed was fraudulent and void as against the creditors. But they were, in consequence thereof, divested of none of their legal rights, but enjoyed them to precisely the same extent, both at law and in equity, that they would have done had the deed been one of gift, instead of manumission. Nor would they, as appears to be supposed, be deprived of all legal remedies against the manumitted slaves in the pursuit of their claims. Having obtained judgments against their debtor, they might have seized and sold the manumitted slaves in the same manner, as if they had been any other goods or chattels fraudulently conveyed by the debtor.

It is true that in case of the debtor's death, the manumitted slaves, or other chattels fraudulently conveyed, would not have passed to his executor or administrator, because such conveyances are valid as against the debtor, and those claiming under him. In the event of such death, the creditor's only remedy is in a court of equity, where, indeed, at his election, he might have pursued it in the life-time of the debtor. Such cases of fraud being cognizable as well at law as in equity. The principles of law asserted in *Allien vs. Sharpe*, were only recognized as applicable to the facts of the case, in which they were used, and were not understood by the judges who decided it; or by this court as impairing the authority, or overruling the case of negro *George vs. Corse*. And after examining, with great deference and respect to that high tribunal, the reason-

ing and opinion of the Supreme Court, in the case of *Fenwick vs. Chapman*, we feel ourselves at liberty to say, that our confidence in the correctness of the decision of this court, in the case of negro *George vs. Corse*, remains wholly unshaken.

The decision of negro *George vs. Corse*, was not, as might be supposed from the terms in which it is spoken of, made by three judges—other judges who sat in the case non-concurring—but was the unanimous decision of all the judges who sat in the case.

In its decision in *Fenwick vs. Chapman*, the Supreme Court appear wholly to have disregarded the principle settled in its early decisions, and from time to time, oft re-asserted by it, even as late as the case of *Martin Luther vs. L. M. Borden* and others, decided at its December term, 1848, (where it was sanctioned by an unanimous opinion,) that in construing a statute of one of the *United States*, not relating to the paramount jurisdiction of the Supreme Court of the Union, it was a rule of the Supreme Court to conform to and follow that construction, which had been given to such statute by the highest judicial tribunal of the State in which it had been passed. The reasonableness and expediency, not to say necessity, for adopting such a rule would be at once apparent to the mind of a lawyer, who would reflect upon the consequences that might reasonably be anticipated from the non-adoption of such a rule—one of its necessary tendencies, if not results, would be the total subversion of all the doctrine, as to the "*lex loci contractus*."

The admissibility of the papers offered in evidence by the defendant, as stated in the first bill of exceptions, after the numerous decisions of this court upon the subject, is no longer a question open to discussion, either by the court or counsel. The County Court was right in overruling the petitioner's objections to the testimony offered in the first bill of exceptions.

The County Court was clearly right in refusing the petitioner's prayer in his second bill of exceptions on various grounds, any one of which was sufficient to warrant the court's refusal of the prayer. The first is, that no evidence had been

offered of the value of any real estate of the testator,—and consequently, the court would have erred in submitting the question of such value to the finding of the jury. The second ground sustaining the court's refusal is, that neither upon the true construction of the act of 1796, nor of the will of the testator, is there any charge upon the real estate of the testator for the payment of debts, either as an auxiliary fund, or as a fund primarily liable therefor. And the third ground is, that conceding there was such a charge, and the primary liability of the real estate for the payment of the testator's debts, that a court of law has no power to enforce such a charge, or estimate the value, or take cognizance thereof,—and therefore, on a petition for freedom in the County Court, no evidence of the value of the real estate can legally be submitted to the jury, or form a subject for its determination.

The County Court was right also in its refusal of the petitioner's prayer in his third bill of exceptions, for the reasons assigned in support of the County Court's refusal of the prayer contained in the second bill of exceptions.

The County Court in like manner was right in refusing the petitioner's prayer in the fourth bill of exceptions, as well for the reasons assigned in support of that court's refusal of the prayer in the second bill of exceptions, as because there is nothing in the will of the testator to show, that the proceeds of sale of the land authorized to be sold by the testator's will, were charged with the payment of his debts or legacies.

The County Court was right too, in refusing the petitioner's prayer in the fifth bill of exceptions, because the order of the Orphans Court having directed a sale "of all and singular the residue of the goods and chattels of the deceased for the payment of his debts, (of which the manumitted slaves was a part) and it appearing by the testimony on which the prayer was predicated, that such sale was necessary for the purpose for which it was made, was an authority to sell for life the manumitted slaves, and if subsequent events, could be resorted to as showing the correctness of a previous order, that of the Orphans Court is fully justified by the fact, that the sale of the

entire personal estate, negroes and all, did not amount to a sufficient sum to discharge the testator's debts. There is nothing in the order which could be regarded as restricting the sale of the manumitted slaves to terms for years.

In refusing the latter part of this prayer of the petitioners, there cannot be error, because the facts upon which it is based, demonstrate not only the insufficiency of the legal assets, exclusive of the manumitted slaves; but that even, after their sale, the insufficiency still continued.

Our approval of the County Court's refusal of the petitioner's prayer in the sixth bill of exceptions is apparent from what we have said on the fourth bill of exceptions.

Our views, expressed on the fifth bill of exceptions sufficiently disclose our approbation of the refusal, by the court below of the prayer of the petitioners in their seventh bill of exceptions.

This court's concurrence with the County Court in its refusal to grant the petitioner's prayer in his eighth bill of exceptions appears in what we have said in regard to his second bill of exceptions.

Our opinion in this case has been extended much beyond our anticipation or design; but our apology for its length, is that many important principles of *Maryland* law are involved in it, of deep concern to creditors, manumitted slaves, and slaveholders; and, indeed to all beneficiaries and representatives of estates, the owners of which have inserted in their wills clauses for the manumission of slaves.

Entirely concurring in all the rulings of the County Court, in this case, we affirm its judgment.

JUDGMENT AFFIRMED.

WESTERN BANK OF BALTIMORE, *garnishee of* JAMES M. RAISIN, *vs.* ADAM B. KYLE.—*June*, 1848.

In 1841 *K.* obtained a decree in equity against *R.*, who, in 1843, delivered to *K.* his notes, with security, payable in six, twelve, and eighteen months, for about one-fifth of the amount of the decree. *K.* agreed to release *R.* from the decree, provided that, upon failure to pay "the above-mentioned notes at maturity, the decree to continue in full force, and the agreement to be null and void." The two first notes were paid at maturity; and some months after, the third fell due, in 1845, *K.* received and accepted the whole amount, with interest on it to the day of payment. In 1846, *K.* sent out an attachment against *R.* The garnishees pleaded payment by *R.* The effect of the payment of the three notes was the only question submitted to the Court. *Held*,

1. The receipt of the notes, and the acceptance of the security, must have been intended as a satisfaction of the decree, if they had been paid at maturity.
2. *K.* could not treat the agreement as a nullity, and still hold on to the notes.
3. The agreement was a compromise, in consideration of security for the compliance of its terms.
4. On failure to pay the third note at maturity, *K.* might have treated the whole agreement as a nullity; and be remitted to his decree crediting it with the two notes paid.
5. Time, in such a case, is an essential ingredient of the contract. The stipulation was for the benefit of *K.*, who might renounce it. It was voidable at his election.
6. A condition in a lease, that, upon neglect of the lessee to pay the rent, or any other failure to perform on his part, the lease shall cease and determine, does not render the lease absolutely void, upon the default in performing the condition, but voidable at the election of the lessor; if he elect to waive the forfeiture, the lessee is bound, as though there had been no breach of condition.
7. If the agreement in this case became a nullity, so did the note. If *K.* had proceeded on his decree, he must have produced the *third* note to be cancelled.
8. The court will not dispense with the point of time in composition, but it may be waived.
9. A mere agreement between parties, to accept a *less* sum for a larger amount agreed to be due, is a *nudum pactum*.

APPEAL from *Baltimore* County Court.

This was an attachment, sued out on the 9th March, 1846, by the appellee against *James M. Raisin*, and laid in the hands of *The Western Bank of Baltimore*, on the 11th of that month.

It was founded on a decree obtained in *Baltimore County Court*, as a *Court of Equity*, on the 22d December, 1841, for $3,200, &c.; revived on the 10th November, 1845.

The garnishees pleaded payment by *James M. Raisin*.

1st Exception.—The plaintiff, to support the issue on his part, gave in evidence a decree of *Baltimore* county court, passed on the equity side, 22d December, 1841.

The garnishee, to support the issue on his part, offered in evidence an agreement in writing, entered into between the plaintiff and the said *James M. Raisin*, the hand writing of which was admitted on the part of the plaintiff.

$600. *Baltimore*, 29th April, 1843.—Received of *James M. Raisin*, three joint notes of himself and brother, *Dr. E. F. Raisin*, for $600, as follows:

One dated 1st April, 1843, at 6 months, bearing interest from 1st October, 1842, for $200 00.

One dated 1st April, 1843, at 12 months, bearing interest from 1st October, 1842, for $200 00.

One dated 1st April, 1843, at 18 months, bearing interest from 1st October, 1842, for $200 00.

Making the above mentioned sum of six hundred dollars.

Upon the payment of these notes at maturity, we agree to release *James M. Raisin* from all penalties and liabilities, on account of a judgment recovered against him in *Baltimore* county court, for $3,200 00. Provided, always, that upon the failure, on the part of *J. M. Raisin* or *E. F. Raisin*, to pay the above mentioned notes at maturity, our judgment against *J. M. Raisin* to continue in full force, and this agreement to be null and void. Dinsmore & Kyle, *for A. B. Kyle.*

And also offered in evidence the three promissory notes of the said *James M. Raisin* and *E. F. Raisin*, mentioned in said agreement, the amounts of which, with the interest growing thereon, were admitted, by the plaintiff, to have been paid him upon the days respectively mentioned in the receipts therefor, endorsed on said notes.

$200. *Kent County, Md., April* 1, 1843.

Six months after date, we, and each of us, promise to pay *Dinsmore & Kyle*, or order, two hundred dollars, for value received, with interest from the first day of October, 1842.

JAMES M. RAISIN.
E. F. RAISIN.

On the back whereof is the following statement and receipt, to wit:

J. M. Raisin and *E. F. Raisin*, $200.

April 1st, at 6 months, .	$200 00
Interest, ...	12 00
Collection in check, . .	50
	$212 50
P'd check on Smyrna, of *E. F. Raisin*, Oct. 2.	200 00
	$12 50

Received twelve dollars and fifty cents on settlement—within note of Messrs. *Pope & Green.* DINSMORE & KYLE.

Balto., October, 1843.

$200. *Kent County, Md., April* 1, 1843.

Twelve months after date, we, and each of us, promise to pay *Dinsmore & Kyle*, or order, two hundred dollars, for value received, with interest from the first day of October, 1842.

JAMES M. RAISIN.
E. F. RAISIN.

On the back whereof is the following statement and receipt, to wit:

J. M. Raisin and *E. F. Raisin*,

April 1st, 1843, 12 months, .	$200 00
Interest, ...	18 00
	$218 00

Balto., 2d April, 1844.—Received amo't of within note of Mr. *C. Green.* DINSMORE & KYLE,
per Henry W. D. Kyle.

$200. *Kent County, Md., April* 1, 1843.

Eighteen months after date, we, and each of us, promise to pay *Dinsmore & Kyle*, or order, two hundred dollars, for value received, with interest from the first of October, 1842.

JAMES M. RAISIN.
E. F. RAISIN.

On the back whereof is the following statement and receipt, to wit:

J. M. Raisin and *E. F. Raisin*, April 1st, 1843, 18 months, due 1st October, 1844.

Amount note, . . .	$200 00
Interest from 1st October, 1842, to 25th June, 1845,	32 82
	$232 82

Baltimore, June 25, 1845.—Received, by the hands of Mr. *T. H. Horsey*, two hundred and thirty-two dollars and eighty-two cents, the am't of within note. DINSMORE & KYLE.

The parties agreed to submit to the court, as the *only* question of law to be raised in the cause, the effect of the payment and receipt of the *third* and *last* of said notes under the said agreement.

The garnishee prayed the court to instruct the jury, that upon the facts offered in evidence, the receipt by the plaintiff of the amount of the *third* note, and interest thereon, on the day on which it was paid, was a waiver on his part of the default of the said *Raisin*, in not paying or causing it to be paid at maturity; and prevented any recovery by him, upon the decree given in evidence on his part.

Which instruction the court (LE GRAND) refused to give, but directed the jury that to the extent to which the garnishee had funds of the said *Raisin* in his hands, at the time the attachment was laid, provided the same did not exceed the balance of said decree, after deducting the amount paid on said notes, the plaintiff was entitled to recover, and that the non-payment, at

maturity, of the last of said notes, remitted the plaintiff, under the foregoing agreement, to the whole debt mentioned therein. To which refusal and direction the said garnishee excepted.

The verdict and judgment being against *The Western Bank* it prosecuted the present appeal.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN, and FRICK, J.

By J. MASON CAMPBELL and REVERDY JOHNSON for the appellants, and

By ALEXANDER for the appellees.

FRICK, J., delivered the opinion of this court.

In this case, *Kyle*, the appellee, was a creditor of *James M. Raisin*, to whom the *Western Bank of Baltimore*, the present garnishee, was indebted in a sum of money, upon a judgment obtained against the bank. Out of the amount of this judgment, *Kyle*, by this proceeding in attachment, seeks to recover the sum alleged to be due to him by *Raisin*.

Kyle had originally, at the December term of *Baltimore* County Court, in Equity, obtained a decree against *James M. Raisin*, for the sum of $3,200, with interest thereon, from the 31st January, 1838; and with this decree unsatisfied, received from *Raisin* three notes, with *Raisin's* brother as surety, amounting in all to $600; for which notes he delivered to *Raisin* the following receipt:

"$600. *Baltimore, 29th April*, 1843.

"Received of *James M. Raisin* three joint notes of himself and brother, *Dr. E. F. Raisin*, $600, as follows:

"One, dated 1st April, 1843, at 6 months, bearing interest from 1st of October, 1842, for $200.

"One, dated 1st April, 1843, at 12 months, 1st October, 1842, $200.

"One, dated 1st April, 1843, at 18 months, 1st October, 1842, $200. Making the above mentioned sum of $600.

"Upon the payment of these notes, at maturity, we agree to

release *James M. Raisin* from all penalties and liabilities on account of a judgment recovered against him in *Baltimore* County Court, for $3,200. Provided always, that upon the failure on the part of *J. M. Raisin*, or *E. F. Raisin* to pay the above mentioned notes at maturity, our judgment against *E. M. Raisin* to continue in full force, and this agreement to be null and void.

DINSMORE & KYLE, *for A. B. Kyle.*"

Of these notes thus given, it appears that the two first were paid at maturity; one of them, as appears by the receipt on the back of it, by *E. F. Raisin*. The third was not paid at maturity, but *Kyle* subsequently, on the 25th of June, 1845, (nearly nine months after it became due) received and accepted the whole amount, with interest on it to the day of payment.

To the attachment, the garnishee on behalf of the defendant, *James M. Raisin*, pleaded payment. And both parties agreeing to submit to the court, as the only question of law to be raised in the cause, the effect of the payment and receipt of the third and last of said notes under the said agreement, the court directed the jury, "that to the extent to which the garnishee had funds of the said *Raisin* in its hands at the time the attachment was laid, provided the same did not exceed the balance of said decree, after deducting the amount paid on said notes, the plaintiff was entitled to recover, and that the non-payment at maturity of the last of said notes, remitted the plaintiff under the foregoing agreement, to the whole debt mentioned therein."

In this instruction we think the court erred. That the release predicated upon the payment of the notes at maturity, must have been conclusive against *Kyle*, if the notes had been met according to the agreement, is undeniable. For the receipt of the notes, and the acceptance of the surety for payment, must have been intended in satisfaction of the whole debt, provided the condition upon which the release was to take effect had been complied with.

It has, however, been contended that the agreement was but a present indulgence, by suspension of further proceedings

against the debtor; that is, the notes, with security, were intended as the purchase money for the indulgence, and were to be paid at all events, even if the release never attached, by the non-compliance in time; that the extinguishment of the entire debt on compliance with the terms, was but to stimulate the payment of the notes at maturity.

On this construction the appellee claims both the benefit of the default, and the security on the notes; and in this mode of construing the agreement, it is that we detect the fallacy of the instruction, which assumes that he might treat the agreement as a nullity, and still hold on to the notes. It is clear to us that the agreement was not intended as an indulgence to the party by a suspension of the debt, but it was a compromise in consideration of security for the compliance of the terms, which if met according to the express stipulations, was to operate as an extinguishment of the whole debt. On the failure of *Raisin* to pay the third note, on the 2d October, 1844, there is no doubt that *Kyle* might have treated the whole agreement as a nullity. He was remitted back again to the original cause of action. He might have credited the debt with the two notes paid, and have proceeded *instanter* upon his decree for the whole balance due. Time was an essential ingredient in his contract, and if the notes were not all paid as they matured, the agreement was to be null and void. By the agreement, the original debt was not cancelled, on the contrary, it was to revive in case of default in the payment of the notes in time. This stipulation was for the benefit and in favor of the appellee. He was not bound to enforce it. He might still, at his election, renounce the right introduced entirely for his advantage, and proceed upon the compromise. The option is with him to avoid the agreement. It is not necessarily void, but voidable at his election. "A condition in a lease, that upon neglect of lessee to pay the rent, or any other failure to perform on his part, the lease shall cease and determine or become null and void, does not render the lease absolutely void upon the default in performing the condition, but voidable at the election of the lessor; if he elect to waive the

forfeiture, the lessee is bound, as though there had been no breach of condition," 1 *Denio*, 516. 50 *Law Library*, 200.

What is the true construction of the conduct of the appellee here? Did he elect to stand by his forfeiture on the 2nd October, 1844, when the last note matured? Would he not naturally, at once, and instanter, have resorted to his original cause of action, if he intended to treat the agreement as a nullity, and insist on the default? Or did he not rather signify on his part a waiver of the forfeiture, by waiting nine months for the payment of the last note, during all which time he had the option and election of enforcing the penalty of the agreement. If within that time, he had elected to proceed upon the forfeiture, would he not, or ought he not to have handed back the third note, and relieved the surety under the agreement? For in this view his election to stand by the forfeiture must invalidate the outstanding note. If the agreement became a nullity, so also did the note; and if he had followed up the default by instant proceedings against *James Raisin*, he must have produced this third note and offered it to be cancelled, before he could recover the whole balance of his claim.

But after an interval of nine months he received from the parties the payment of this third note, with interest in full. Was not this acceptance an assertion, or admission of existing rights under the agreement? That note had no legal existence or validity, but under the agreement. He might, it is true, have sued upon it, as soon as it became due; but if so, it must be that he held the agreement still in force, and had elected to waive the forfeiture. And if he waited to receive the amount without suit, is not the receipt of it, an affirmance of the continued existence of the agreement? By the receipt on the back of the note on the 15th June, 1845, he concedes the compromise to be in full life. He himself revived it, and waived the default; and what was done on that day, was as if done on the day agreed upon in the note.

The case *ex parte Bennett*, in *2d Atkyns Chancery Reports*, 526, cited in the argument of this cause, is a case in point. There *Lingood* being indebted to *Bennett* in a large sum, it was

agreed to compound for a certain amount, to be paid to *Bennett* by instalments of £25 every quarter of the year. *Lingood* paid the first, and for the second gave *Bennett* two notes, payable at a future day, which *Bennett* accepted. *Lingood* became bankrupt, and *Bennett* insisted before the commissioners, that he had a right to prove his whole debt. The Lord Chancellor said: "The rule has been rightly laid down, that the court will not dispense with the point of time in compositions. For when a creditor agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails of payment, he cannot be relieved." But "*Bennett's* acceptance of the two notes from *Lingood* instead of the money, is a waiver of the particular default in the payment of the instalment." It is also to be observed, that this is not the case of a mere agreement between the parties to accept a less sum for a larger amount, agreed to be due, which is *nudum pactum*. In such case, the appellee would have the right, as claimed by his counsel, to receive the $600, and credit the amount *pro tanto* on the judgment or decree. That rule may well apply to a security of equal degree for a smaller sum, which is no satisfaction for a larger one, payable in the same manner. But here where there is a new consideration for the relinquishment of the residue of the debt—the security of *Raisin's* brother upon the notes. The books abound with authorities to show, if paid, it is a good accord and satisfaction of the whole debt. Here the brother, it appears, paid at least one of the notes. And it is said by Lord *Ellenborough*, in 11 *East*. 394, cited in *Geiser vs. Kershner*, 4 *G. & J.* 307, "if on the faith of such agreement, a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder, the agreement is binding." It is the security for a less sum which, if the creditor accepts, as a satisfaction for the whole debt is a sufficient and binding consideration. But the whole amount stipulated for must be paid. 3 *Eng. Com. Law*, 363. 1 *Taunt.* 526. 20 *Johns.* 78. 2 *Metcalf*, 283. 1 *Smith's Leading Cases*, 146. And as in the case under review, *time* may be made an essential

ingredient in the contract. But as before remarked, such a stipulation may be waived by the party in whose favor it is made. *Kyle* did not choose to insist on his forfeiture, and proceed against the original debtor for his balance; but elects to abide by the note for which he has security, accepts the $200, with interest, *after the default*, and receipts in full for the same on the note.

This he must be presumed to have done with a knowledge of his rights, and of all the consequences; and the receipt by him of the amount of the third note, must be construed as a waiver on his part of all right under the agreement to claim or enforce the forfeiture.

In the discussion of the case, the counsel for the appellee urged the objection before the court, that the plea of payment did not meet the case presented; that the only answer to an acceptance of a less sum in satisfaction of a larger, is accord and satisfaction. "It appears, however, by an endorsement of this plea, that all errors in pleading on both sides are released, and the garnishee may have liberty to give the special matter in evidence under it." To this agreement it may be objected, perhaps, that it is only signed by the counsel for the garnishee. But we find the further agreement before adverted to, that the only question to be raised in the cause was upon the effect of the payment, on which this court have just expressed their opinion; so that if the release of errors is not obligatory on both parties, yet both have agreed to restrict themselves to the only one question submitted by them. The only prayer offered is predicated upon the notes offered in evidence, as being a satisfaction of the debt. No question is raised in the prayer, or upon the record, as regards the pleadings; and where it does not appear in the record that the question, as regards the form or sufficiency of the pleading, has been submitted or decided in the court below, this court has only to repeat here, (in recurring again to the act of 1825, ch. 117,) that it is prohibited from entertaining the question. Further, it is urged that as the writ of attachment, after reciting the decree of 1841 against *Rairie*, alleges the revival of said decree, in November, 1845,

as part of the cause of action; and the only defence taken being on this plea of payment, the plea must necessarily have reference to the said decree so revived; and there being beyond this plea no other denial of the validity of this decree, its operation in the case concludes the defendant below; because the previous acceptance and payment of the notes in evidence cannot be said to be an answer to the *subsequent* decree or judgment so revived, as the cause of action.

It might be a sufficient answer to this on the part of the appellee to say, that although such decree is recited in the writ as part of the cause of action, yet it no where appears in proof upon the record. No evidence was offered in the court below of the existence of such revived decree.

The plaintiff there gave in evidence a decree on the equity side of the court, dated 22d December, 1841, and then rested his case. The garnishee, to support the issue made, offered the agreement and the proof of the payment of the notes, as before stated, and of course with reference to the decree of 1841. So that this position is not maintained in fact; but even if allowed to have any force as urged by counsel, the point is concluded by his own agreement, to restrict the enquiry in this case singly to the effect of the payment of the notes under the agreement, on which the opinion of the court, as before expressed, is against the appellee, and the judgment below is reversed. JUDGMENT REVERSED.

ALEXANDER FISHER, WILLIAM D. MILLER, AND WILLIAM E. MAYHEW, JR. *vs.* WILLIAM F. JOHNSON.—*June*, 1848.

Arrears of rent due a landlord, of which the sheriff had notice by a due warrant of distress, before sale, cannot be retained for the use of such landlord, by such sheriff, out of the proceeds of the goods of a stranger levied upon, while, on the demised premises, under a writ of attachment, to compel an appearance at law, the same goods having been duly condemned, and afterwards sold by *fieri facias*, under the judgment of condemnation.

APPEAL from *Baltimore* County Court.

On the 4th of August, 1846, the appellants sued out a warrant of attachment, to recover from *Samuel Comly*, a non-resident, the sum of $3,511 66. The attachment was returned.

"Laid in the hands of *William F. Johnson*, on the 12th of August, 1846, and attached as per schedule. *Comly* not appearing, judgment of condemnation, *nisi*, was rendered on the 13th of the same month, and *William E. Mayhew* gave the usual confession, to make restitution within a year and a day, &c.

The appellants then sued out a writ of *fieri facias*, and on the 6th of March, 1847, the parties agreed as follows:—

It was admitted, that on the 4th August, A. D., 1846, the plaintiffs sued out of *Baltimore* County Court a writ of attachment on warrant, against the defendant, founded upon a certain draft for $3,500, dated the 14th July, A. D., 1845, and payable twelve months after date, drawn by the defendant, upon *Messrs. Comly Bros., Baltimore*, in favor of a certain *T. J. Folwell*, accepted by *Messrs. Comly Bros.*, and by *T. J. Folwell*, endorsed to the plaintiffs. That the plaintiffs were, at the time of suing out said writ, commission merchants residing and doing business in the city of *Baltimore*, by the name of *Fisher, Miller & Co.;* and that the defendant was, at that time, a citizen of the state of *Pennsylvania*, residing in the city of *Philadelphia*, as was also the payee of said draft, said *J. J. Folwell.* That the *Messrs. Comly Bros.* were, up to a short period before suing out said writ, (as hereinafter stated,) calico

printers and manufacturers, residing and doing business in *Baltimore* county, upon a certain tract of land commonly known as the "*Forkland Print Works*," belonging to a certain *William Fell Johnson*, a resident of *Baltimore* county aforesaid; which tract of land, together with the improvements, consisting of mills, store, dwelling houses, and other buildings, the said *Johnson* had leased to the said *Comly Bros.*, (that is to say, to certain *Samuel Comly, Jr., and Nathan F. Comly, trading as Comly Bros.,)* by lease dated the 2d October, A. D., 1845, duly recorded among the land records of *Baltimore* county. That under said lease, said *Comly Bros.* took possession of the said premises, and by the terms thereof, were to hold and enjoy the same for the space of nineteen years and six months from the date thereof, yielding and paying to said *Johnson*, his heirs and assigns, an annual rent of $1,800, payable in semi-annual instalments of $900 each, on the first days of April and October in every year; which rent, said *Comly Bros.*, by the terms of said lease, covenanted to pay, although *there was no provision in said lease contained for re-entry or distress*, or other remedy of any kind by said *Johnson*, in case of failure to pay the same, at the time and in the manner therein specified. That said *Comly Bros.* took possession of said premises under the said lease, at the time of the date thereof, and so continued in possession, engaged in their business of manufacturing as aforesaid, up to the month of March, A. D., 1846, at which time they failed in their said business, and stopped payment of their obligations. That on the 13th March, A. D. 1846, the said *Comly Bros.*, it appearing by their books that they were then very largely indebted unto the defendant, sold to him, as appears by the entries and charges upon their said books, all the personal property on the said premises, except the furniture hereinafter mentioned, being certain machinery and fixtures in the mills, and certain goods in the store upon the said premises, the said defendant being credited on said books with payment of the same, according to an inventory and statement of the amount and value of the said personal property.

That subsequently, to wit: on the 30th May, A. D., 1846, the said *Samuel Comly, Jr.*, and *Nathan F. Comly*, trading as aforesaid, as *Comly Bros.*, applied for and obtained the benefit of the insolvent laws of *Maryland*. That under said application, certain *Samuel H. Tagart* and *John H. Ing* were appointed the permanent trustees of said *Samuel Jr.*, and *Nathan F. Comly*, and on the 27th July, A. D., 1846, said permanent trustees made sale, under a standing rule of *Baltimore* County Court, of all the property of said insolvents which had been mentioned in their schedule, and come into possession of the *said trustees*, to wit: their interest in the lease aforesaid, from *William Fell Johnson*, which was purchased from the said trustees at said sale, subject to the payment by the purchaser of all rent then in arrear by one *Joseph P. Paneoast*, for the sum of sixty-five dollars; and said sum being paid to the said trustees, an assignment of said lease was, by them executed and delivered to said *Paneoast*, a resident of *New Jersey*. That said *Comly Bros.*, after their sale as aforesaid, discontinued their business upon the said premises, but continued to reside in a certain dwelling house upon the same, until the 10th December, A. D., 1846, at which time they removed from the same, carrying with them certain furniture of the value of about $300, which had been, during the period of their residence upon the said premises, up to the time of their removal therefrom, as aforesaid, in the said dwelling house on said premises, undistrained by the said *Johnson*. That the said defendant, after the sale to him as aforesaid, suffered the said property so sold, to wit: certain machinery and fixtures in the mills, and certain store goods in the store upon the said premises, to remain upon the said premises; and the same were on the 5th August, A. D., 1846, seized upon and taken by the sheriff of *Baltimore* county, as and for the goods of the defendant, under and by virtue of the writ of attachment, sued out by the plaintiffs as aforesaid. That the said sheriff, by the directions of the plaintiffs, left the said goods, after the levy, upon the said premises, and appointed a deputy sheriff to take charge of and watch the same, having previously, according to law, made, at the time of said levy, an

appraisement and schedule of said goods, and returned the same as levied per schedule. That said goods remained in custody of the sheriff, by his deputy, upon the said premises (being bulky and incapable of removal, without great labor and expense,) until the 16th December, A. D., 1846, when they were sold by the said sheriff under a writ of *venditioni exponas*, issued out of *Baltimore* County Court, on the 30th November, A. D., 1846, upon an absolute judgment of condemnation of said goods entered in this cause on the 27th November, A. D., 1846, a judgment of condemnation *nisi* having been entered in said cause on the 13th November, A. D., 1846, and no claim interposed or cause shewn against making said judgment absolute, it was accordingly, so entered as aforesaid; and that the gross amount of sales of said goods, as made by the sheriff under the writ aforesaid, was $3,980 46, out of which, said sheriff claimed for his poundage fees, the sum of $121 17, beside expenses of advertising and sale, leaving a nett amount in his hands, after deducting his poundage fees and expenses of sale and watching said goods, of $3,366 89.

And it is further admitted, that there was due to said *William F. Johnson*, landlord of the said premises, for rent under the lease aforesaid, on the 1st April, A. D., 1846, the sum of $730, which sum remained due and unpaid up to the 1st October, A. D., 1846, when a half year's rent, to wit: $900 fell due under the lease aforesaid, making in all, the sum of $1,630, for rent in arrear, due on the 1st October, A. D., 1846, which sum remained in arrear and unpaid up to and at the time of the sale of said goods by the sheriff, as aforesaid, and their removal from said premises, which removal took place a few days after said sale. That before the sale and removal of said goods, and after the 1st October, A. D., 1846, the said *William F. Johnson* notified the said sheriff of his claim for rent as aforesaid, by placing in the hands of the said sheriff a distraint warrant for the amount of said claim for rent, and notice of the rent due him, accompanied by an affidavit, which warrant was not executed, or any proceedings taken thereunder by the said sheriff.

It is further admitted, that on the 6th March, A. D., 1847, the said *Johnson* filed a petition in said court in the cause aforesaid, setting forth his said claim for rent, claiming to be paid the same out of the proceeds of sale in the hands of the said sheriff as aforesaid, and praying a rule upon the said sheriff to shew cause why the amount of said claim should not be paid to him, the said *Johnson*, out of the said proceeds. That a rule to shew cause, as prayed, was granted by said court on the said 6th March, A. D., 1847.

Whereupon the plaintiffs appeared on the said 6th March, A. D. 1847, and shewed for cause, against making the said rule absolute, that the said *Johnson* was not entitled to the sum of $1,630, as claimed by him as aforesaid.

1. Because said *Johnson* was not entitled, in law, to claim any portion of the rent due him out of the proceeds of sale in the hands of the sheriff as aforesaid.

2. Because said *Johnson* was not entitled to claim, out of said proceeds, such part of the rent due him as fell due after the levy of the sheriff, made as aforesaid.

3. Because said *Johnson* was not entitled to claim said rent, free from the payment of a rateable proportion of the sheriff's poundage fees and expenses incurred in making sale of said goods.

4. Because, for other good and sufficient reasons, said *Johnson* was not entitled to claim and receive, out of the proceeds of sale as aforesaid, the sum of $1,630, as claimed by him.

Whereupon, it was agreed between the plaintiffs and the said *Johnson*, and the said sheriff, that all questions arising, or to arise out of the claim made by said *Johnson* in this cause, should be submitted to the court aforesaid, upon a written statement of facts; in comformity with which agreement, this statement is prepared by assent of said parties, and is herewith filed. And it is further agreed, that no objection shall be made by any party to this agreement, to the right and jurisdiction of said court, to hear and adjudge all questions arising upon the aforegoing statement of facts, together with all presumptions and inferences legitimately deducible therefrom, and to order

distribution of the said funds in the hands of the sheriff as aforesaid. That nothing herein contained shall be construed, to deprive any party to this agreement of his or their right to an appeal from the determination and order of said court; and that upon such appeal, as well as at the hearing of this court, all objections to matters of form are expressly waived.

The County Court, (LE GRAND, A. J.,) delivered the following opinion:

"The material and most important question which this court is now called upon to decide, is:—Does the statute of 8 *Anne*, chapter 14, refer to executions issued against property of a stranger, which may happen to be on the demised premises, as well as to executions issued against the property of the tenant? I confess, on looking at most of the text books and the reports therein referred to, I was inclined to the opinion, that the statute only intended to refer to executions issued against the goods of the tenant. Prior to the passage of the statute of *Anne*, by the common law, when an execution was levied upon the tenant's goods, the landlord lost his rent, and could not enter to distrain; although the landlord had the right to distrain the goods of a stranger, if found on the demised premises, yet he had not the right to follow them beyond the premises, as he had in regard to the goods of the tenant. If the stranger succeeded in getting his goods off the premises, the right of the landlord to distrain was gone. All the elementary works, with the exception of that of *Archbold* on the law of landlord and tenant, as well as the forms, seem to contemplate the statute of *Anne* as only referring to executions issued against the goods of the tenant. This circumstance, connected with the apparent injustice of making one man pay the debts of another, inclined me to the opinion, that the statute of *Anne* was only intended to relieve the landlord from the common law principle. That the goods of the tenant in *custodia legis*, could not be distrained, or the rent of the landlord paid before they were so placed, and not to have reference to the goods of a stranger. From the character of the question, it would be reasonably supposed to have frequently arisen both in *England* and in this country;

but such has not been the case. The only cases in which, so far as I have been able to ascertain, where the question has at all been considered, are those of *Foster vs. Cookson*, 41 *Eng. C. L.* 606, and *Russell vs. Doty*, 4 *Cowen*, 576. In the first of these there is a mere *dictum* of *Justice Patterson*, that the statute was designed to extend to *all* executions, whether issued against the goods of a *stranger*, or of the *tenant*, provided they were on the demised premises. In the other, the question arose under the statute of *New York*, *(I. R. S.* 437,) which provides that "no goods or chattels whatsoever, in or upon the demised premises, shall be liable to be taken by virtue of any execution."

The Supreme Court of *New York* held, that this statute did *not* refer *only* to executions against the goods of the tenant, but to those against the goods of a *stranger* also.

The language of 8th *Anne*, chapter 14, is almost identical in words with the *New York* statute, and is so in its substance. The words are: That no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless, &c., &c.

This being so, in deference to the *dictum* in *Forster vs. Cookson*, and the adjudication in *Russell vs. Doty*, I shall hold, the landlord is entitled to his year's rent. Of the rent, there was due six months on the 1st April, 1846, and six more months on the 1st October of the same year. The attachment was levied on the 4th August, 1846. An attachment, under an attachment system, is not such an execution as is contemplated by the statute of *Anne*, but the *fi. fa.* which issued in the judgment is such an one.

It is therefore ordered, this 23d March, 1847, that the sheriff of *Baltimore* county pay to *William Fell Johnson*, or his counsel, the sum of $1,630, less $16 30; to be paid to clerk of *Baltimore* County Court, under act of 1841, ch. 271, (being amount of rent due him up to the 1st October, 1846,) out of

the proceeds of sale now in his hands, realized from the sale under the *fi. fa.*, issued heretofore in this case.

The plaintiffs—the attaching creditors—appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J., at December term, 1847.

By W. F. FRICK and ALEXANDER for the appellants.

That the appellee, *Johnson*, was not entitled to the amount of rent paid to him under the court's order of the 23d March, 1847.

1st. Because the statute, 8 *Anne*, *ch.* 14, applies only to cases where the goods of the tenant are taken in execution; and not to a case like the present, where the goods of a stranger upon the demised premises, are taken by process of law.

2d. Because a proceeding by attachment, under our act of 1795, ch. 56, is not an execution within the meaning of the aforesaid statute of 8 *Anne;* and the landlord, in such case, acquires no right to payment of his rent before a removal of the goods.

3d. That if the landlord acquires no right to payment of his rent, by and at the time of the taking of the goods under a writ of attachment, he cannot acquire any by proceedings subsequent to the writ; whereby the goods taken are condemned and sold.

4th. That the landlord, under the *statute of Anne* aforesaid, is not entitled to any rent, except what is due at the time of taking the goods, and not to rent subsequently falling due, while the sheriff is in possession; and therefore, that if the appellee in this case is entitled at all, he can recover only the rent actually due at the time of taking the goods by the sheriff, under the writ of attachment.

By WILLIAM F. GILES for the appellee.

1st. That under the statute of 8 *Anne*, ch. 14, sec. 1, the landlord is entitled to be paid his year's rent, without any deduction for poundage fees.

2d. That an attachment against the non-resident, or absconding debtor, is not an execution within the meaning of the said statute, but that the *fieri facias* which issues after judgment of condemnation is.

3d. That therefore in this case, the landlord was entitled to his year's rent, due the 1st October, 1846.

4th. But if the court should be of opinion, that an attachment is an execution within the meaning of said statute, and suspended the landlord's right to distrain, then, as the possession of the premises was held by the sheriff, (by the appellants' direction,) up to the 10th December, 1846, and the proceeds of sales were in the sheriff's hands to be distributed; the sheriff was bound to pay the landlord, not only the one month's rent in arrear, when the attachment was laid, but for the use and occupation of the premises, from the taking of the goods under the attachment, until the sale under the *fieri facias*; and that it was fully equal to the amount of the rent which the court directed to be paid.

5th. That the statute applies to all cases where, under an execution, property is seized on demised premises, on which the landlord had a right to distrain; no matter to whom the property belongs, or against whom the execution may have issued.

By the court,

JUDGMENT REVERSED.

The State of Maryland *vs.* The Baltimore and Ohio Rail-road Company.—*December*, 1847.

The Board of Directors of the *Baltimore and Ohio Rail-road Company* having applied $146,816 of the net revenue of the Company for the year 1846, to the re-construction of the road between *Harper's Ferry and Baltimore*, and for machinery and other purposes, leaving a cash balance of only $90,504, and designing to reimburse the stockholders for the amount so applied, in November, 1846, declared a dividend of three dollars per share, payable on and after the 20th of that month, as follows: to all stockholders of less than fifty shares, cash; to all of fifty shares and over, one dollar per share in cash, and two dollars per share in the Company's bonds, bearing interest payable quarterly, and redeemable in twenty years, and deliverable to the stockholders at the office of the Company. The State being a stockholder to the amount of five thousand shares, refused to receive the dividend as declared by the Company, and instituted an action of *assumpsit*, to recover the amount of *three per cent.* in money. *Held*,

That by the 14th section of its charter, (act of 1836, ch. 123,) the President and Directors of said Company were invested with *all the rights and powers necessary to the construction and repair of a Rail-road from the city of Baltimore to the Ohio River*, and had a right to expend any part of its revenue for the re-construction of the road.

That the Company could make such expenditure absolutely, and without being bound to refund, or they might appropriate and agree to refund to the stockholders in their discretion.

Under the 19th section of the charter, the Directors are bound to divide only such part of the net profits as they may deem proper,—and their judgment of what is proper is conclusive upon the stockholders.

They can apply any portion of the net profits not divided, to any legitimate purpose of the Company.

In all questions of power arising under an act of Assembly, granting a franchise of this description, the test of the existence of the power is to be found in the inquiry, whether the same is expressly granted, or whether it is incidental to any express grant of power, and necessary to its accomplishment.

The established rule, that every corporation is limited in its powers by the object to be accomplished; and if there be a specification of the means for accomplishing a particular object, then such specification excludes all others, is admitted, but is not considered as applicable to this case.

The 13th section of this charter, giving the power to increase the capital stock on the terms therein mentioned, and to borrow money—however it may exclude other means of accomplishing the construction of the road—is no limitation of the grant of *all powers*, limited only by their necessity, conferred by the 14th sec.

The design of the 19th sec. was to define what was to be the subject of the dividend, and to prescribe the mode of dividing among the stockholders, and to allow a dividend from time to time, if the President and Directors deemed it proper; but if, in the honest discharge of their duties, they deemed that

the net profits should be otherwise applied to further the objects of the act of incorporation, they were at liberty to withhold a dividend.

The 13th sec, authorizing the purchase of motive power, &c. with the funds of the Company, to be placed on any *Rail-road constructed by them under the act*, confers the same authority as if there had been a general power to purchase, without any reference to the funds of the Company, and does not militate against the construction above given to the 14th sec.

The true construction of the 9th sec. of the act of 1835, ch. 395, which guarantees to the State the payment of the interest on the instalments advanced by her on the stock subscribed for under that act, is that this guarantee is to be satisfied out of the *gross profits* of the Company: and this guarantee is in no manner impaired by the act of 1838, ch. 386.

The State was not bound to receive these bonds, (though if accepted, they would have been valid in her hands,) but might treat the dividend, so far as it proposed their delivery, as illegal,—and she has a remedy commensurate with the injury thereby sustained, but not in the form of an action of general *indebitatus assumpsit*.

By instituting this form of action, the State affirmed the dividend, and must take it as it is. Hence, she cannot recover the $15,000 in this suit, because the dividend declared did not profess to be a dividend to that extent in money.

The relation of trustee and *cestui que trust* exists in a qualified sense, as between the directors and the stockholders, and the funds in the hands of the former in which the latter have an interest, cannot be sued for in this form of action, unless a dividend has been declared.

The charter of the Company does not justify the discrimination made between the large and small stockholders, giving to the latter *three per cent.* in money, and to the former, money and bonds.

There can be no recovery in this case of the $5,000, which was the amount of the cash dividend payable to the State, there having been no demand for payment thereof, either of the Company, or its authorized agents; such previous demand being clearly necessary to maintain this suit.

The establishment of the principle, that suits could be instituted without demand, for dividends declared by banking and other corporations, would greatly impair the value of stocks held therein.

Interest will not be chargeable against an incorporation on dividends declared, nor will limitations run until demand made.

APPEAL from *Baltimore* County Court.

By a resolution of the General Assembly of *Maryland*, passed at its December session, 1846, the Attorney General was directed to institute suit against the *Baltimore and Ohio Rail-road Company*, to recover the dividend of $15,000, which had been declared by that Company, payable in part in the bonds of said Company. An action of general *indebitatus assumpsit*

was accordingly docketed, by consent of parties, in *Baltimore* County Court at its May term, 1847, by the appellant against the appellee. The declaration contained the common money counts, and a count upon an account stated,—to which the defendant, the appellee, pleaded *non-assumpsit.* At the trial, the plaintiff, to maintain the issue on its part, offered in evidence the advertisement, admitted to have been published by the authority and direction of the defendant in the "*Baltimore Patriot,*" which is recited in the opinion of the court.

It was also admitted, that the plaintiff was at the time when said dividend was declared, the holder of five thousand shares of the capital stock of the *Baltimore and Ohio Rail-road Company.*

The plaintiff further offered in evidence, the Twentieth Annual Report of the President and Directors to the stockholders of the defendant. The letter of *Mr. McLane,* President of said Company, to *Thomas Donaldson, Esq.* and the resolution, No. 65, of the legislature of *Maryland* of December session, 1846; all which are sufficiently stated in the opinion of the court.

The defendant then offered the charter of the *Baltimore and Ohio Rail-road Company,* (act of 1826, ch. 123,) and its supplements. They also offered in evidence an extract from the proceedings of the meeting of the Board of Directors, declaring the dividend, by which it appears the following resolution was passed on the 26th November, 1846, without a division:—

"*Resolved,* that a dividend of *three per cent.* be declared on the stock of the Company, to be paid to all stockholders owning on the first day of the present month less than fifty shares, in cash; and to all stockholders holding fifty or more shares, one-third of the amount in cash, and two-thirds of the amount in bonds, to be issued in accordance with the resolution of the board, passed on the 3d December, 1845, authorizing the issue of bonds; and also of another resolution on the first day of the present month, and that said dividend be payable on the 20th November next."

They also proved that at the time the dividend was declared, there were present at the meeting six of the Directors on the part of the State. They further proved that the money to pay the cash part of the said dividend, was deposited at the *Commercial and Farmers' Bank*, to be paid to all stockholders who might demand the same—and that the certificates of stock were in readiness for delivery for the other portion of said dividend at the office of the Company in *Baltimore*,—and that all the stock had been issued and delivered to the stockholders, in accordance with the terms of the resolution declaring the dividend, except the stock that was payable to the State; and also that the entire dividend in cash had been paid, except the State's portion and some small sums not called for, but not exceeding what usually remains unpaid for a longer or shorter time after every dividend.

The defendant further offered in evidence the message of the Governor to the legislature of 1846–'7, and the proceedings of the annual meeting of the stockholders of the *Baltimore and Ohio Rail-road Company*, held in October, 1846, accepting the annual Report of the President.

Whereupon, the plaintiff prayed the opinion and direction of the court to the jury, as follows:—

1st. That the President and Directors of the *Baltimore and Ohio Rail-road Company* had not, under their charter, the right to appropriate and expend the revenue of the road for 1846, or any part thereof, for the re-construction of the road, under the resolution passed by the board on the 5th January, 1846; and that the portion of the revenue, as expended by the board, constituted a part of the net profits of the road for the year 1846, of which the dividend for that year was to be declared and made under the 19th sec. of the defendants' charter.

2d. If the jury shall find from the evidence, that the President and Directors of the *Baltimore and Ohio Rail-road Company* did, out of the net profits of the road for the year 1846, in October in that year, declare a dividend of three dollars per share on their capital stock, payable in the mode set

out in their advertisement, offered in evidence by the plaintiff; and that the State was on the 1st October, a holder of five thousand shares of said stock; that then the mode of payment specified in said advertisement is not obligatory on the plaintiff, and the plaintiff is entitled to recover the whole of its dividend on said stock in money.

3d. If the jury shall find from the evidence that the President and Directors of the *Baltimore and Ohio Rail-road Company* did, in October, 1846, declare a dividend of three dollars per share on the capital stock of said Company, and made the same payable in the mode specified in the advertisement offered in evidence by the plaintiff; and shall also find that the net profits of the said Company for that year, received by the President and Directors, were more than sufficient to pay said dividend; and that the plaintiff was a holder of five thousand shares of said stock on the 1st October, 1846; that then the plaintiff is entitled to recover the whole of its said dividend, although the jury shall believe that at the time when said dividend was declared, the said President and Directors had not sufficient cash on hand to pay the same.

4th. If the jury shall find from the evidence, that the President and Directors of the *Baltimore and Ohio Rail-road Company* did, in October, 1846, declare a dividend of three dollars per share on the capital stock of said Company, and made the same payable in the mode specified in the advertisement offered in evidence by the plaintiff; and that the plaintiff was on the 1st October, 1846, a holder of five thousand shares of said stock; that then the plaintiff is entitled to recover in this action the whole of its said dividend in money.

And the defendant prayed the opinion and direction of the court to the jury as follows:—

1st. That the Company had a right to appropriate, as they did, $146,816 to the purposes of the road, as stated in the annual report of defendant offered in evidence by plaintiff.

2d. That it was the right of the Company by its Directors, to make such appropriations absolutely, and without being bound to refund the same to the stockholders, or to appro-

priate and agree to refund it to the stockholders, in their discretion.

3d. That under the 19th sec. of the charter, the Directors are only bound to divide, annually or semi-annually, such portion of the net profits of the Company as they may deem proper,—and that their judgment of what is proper is conclusive upon the stockholders.

4th. That whatever amount of net profits is not from time to time divided, but retained by the board in the exercise of their judgment, under the authority vested in them by said 19th sec. they have a right to apply to any of the legitimate purposes of the Company.

5th. That the defendant having offered to pay the dividend which was declared in the mode in which it was made payable, and the plaintiff having refused so to receive it in that mode, or to receive any less sum in cash than $15,000, if the jury find that the plaintiff did so refuse, the plaintiff cannot recover in this case even the amount which was made payable in cash.

And the plaintiff then offered the following additional prayer:—

The plaintiff wishes the court further to instruct the jury, that under the *fifth* prayer of the defendant, they must find an actual offer on the part of the defendant, and an actual refusal on the part of the plaintiff, mutually communicated, the one to the other; and that the mere publication of the said advertisement given in evidence, although the same was known to the plaintiff, is not a sufficient offer, nor the meaning of said prayer: and the mere determination of the treasurer, not to take the dividend as declared, and the communication of that determination by him to the legislature, is not a sufficient refusal within the meaning of said prayer.

And the court rejected and refused all the prayers offered on the part of the plaintiff, and granted all offered by the defendant: to which rejection and refusal of the plaintiff's prayers, and to the granting of the said prayers of defendant,

the plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff appealed.

The sections of the charter of the *Baltimore and Ohio Rail Company*, specially referred to in the opinion of the court, are as follows:—

13. *And be it enacted*, That if the capital stock of said Company shall be deemed insufficient for the purposes of this act, it shall and may be lawful for the President and Directors of said Company, or a majority of them, from time to time, to increase the said capital stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the Company, for any sum not under their par value; and that they, or a majority of them, shall have power to borrow money for the objects of this act, to issue certificates or other evidences of such loans, and to pledge the property of the Company for the payment of the same, and its interest.

14. *And be it enacted*, That the President and Directors of said Company shall be, and they are hereby invested with all the rights and powers necessary to the construction and repair of a Rail-road from the city of *Baltimore*, to some suitable point on the *Ohio River*, to be by them determined, not exceeding *sixty-six feet* wide, with as many sets of tracks as the said President and Directors, or a majority of them, may deem necessary; and they, or a majority of them, may cause to be made, or contract with others for making said Rail-road, or any part of it; and they, their agents, or those with whom they may contract for making any part of the same, or their agents may enter upon, and use and excavate any land which may be wanted for the site of said road, or the erection of warehouses, or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road, or its works; and that they may build bridges, may fix scales and weights, may lay rails, may take and use any earth, timber, gravel, stone, or other materials, which may be wanted for the construction or repair of any part of said road,

or any of its works, and may make and contract all works whatsoever, which may be necessary and expedient in order to the proper completion of said road; and that they, or a majority of them, may make, or cause to be made, lateral Rail-roads in any direction whatsoever, in connection with said Rail-road from the City of *Baltimore* to the *Ohio River*, and in the construction of the same or their works, shall have, possess, and may exercise all the rights and powers hereby given to them, in order to the construction or repair of the said Rail-road from the city of *Baltimore* to the *Ohio River*.

18. *And be it enacted*, That the said President and Directors, or a majority of them, shall have power to purchase with the funds of said Company, and place on any Rail-road constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road; and they shall have power to charge for tolls upon (and the transportation of persons,) goods, produce, merchandize, or property of any kind whatsoever transported by them along said rail-way from the city of *Baltimore* to the *Ohio River*, any sum not exceeding the following rates, &c.; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said Company incorporated by this act, and their successors forever; and the shares of the capital stock of the said Company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law.

19. *And be it enacted*, That the said President and Directors shall annually, or semi-annually, declare and make such dividend, as they may deem proper, of the net profits arising from the resources of the said Company, after deducting the necessary current and probable contingent expenses; and that they shall divide the same amongst the proprietors of the stock of said Company, in proper proportions to their respective shares.

The 9th sec. of the act of 1835, ch. 39, containing a guarantee to the State, is as follows:—

SEC. 9. *And be it enacted*, That before any subscription shall be made to the capital stock of the said *Baltimore and Ohio Rail-road Company*, under and by virtue of this act, the stockholders of said Company shall, in general meeting assembled, stipulate, agree and bind the said Company by a proper instrument of writing, signed by the President, and under the corporate seal thereof, to be lodged with the Treasurer of the *Western Shore*, to guarantee to the State of *Maryland*, after the expiration of three years from the payment by the State, of each of the instalments on the stock hereby authorized to be made to the stock of said Company, the payment from that time out of the profits of the work, of six per cent. per annum, payable semi-annually, on the amount of money which shall be paid to said Company, under and by virtue of this act, until the clear annual profits of the said Rail-road shall be more than sufficient to discharge the interest which it shall be liable so to pay to the State of *Maryland*, and shall be adequate to a dividend of six per cent. per annum among its stockholders, and thereafter, the State shall, in reference to the stock so subscribed for, and on so much thereof as the State may hold, be entitled to have and receive a perpetual dividend of six per cent. per annum out of the profits of the work, as declared from time to time, and no more, and all and so much of such annual profits as shall exceed six per cent. shall be distributed to the other stockholders, according to their several interests in the said Company; and in consideration of the interest so to be secured to the State, the said *Baltimore and Ohio Rail-road Company* shall be, and they are hereby authorized, in addition to the charge now authorized to be made by said Company, for the transportation of passengers, to increase the price or charge for such transportation, to any amount not exceeding one cent per mile for each person passing on said road: and the *Eastern Shore Rail-road Company*, the *Maryland Canal Company*, and the *Annapolis and Potomac Canal Company* are hereby respectively required as a condition precedent to the subscriptions by

this act, authorized to said Companies respectively, to enter into covenants with the State of *Maryland*, under the corporate seal of each of said Companies respectively, to pay to the State of *Maryland*, semi-annually, by each of said Companies respectively, out of the profits of said respective works, a sum equal in amount to the sum of six per cent. per annum, on the subscriptions authorized by this act, to be made on certain other conditions to the capital stock of the said respective Companies; such payments of interest not to be made to the State, until the expiration of three years from the payment of each instalment on the subscription to the respective Companies aforesaid, and any excess of dividends on the capital stock of the State, in either of said Companies, above six per cent. per annum, shall be distributed to the other stockholders of the Company declaring such excess of dividend.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By GEO. R. RICHARDSON, *Attorney General*, and J. NEVETT STEELE for the appellant.

By REVERDY JOHNSON and JOHN NELSON for the appellee.

On the 14th February, 1848, before the final decision of the case, the following opinion and suggestion was filed by the court:—

"We are of opinion that power is conferred on the President and Directors of the *Baltimore and Ohio Rail-road Company*, by its charter, to apply the revenues of the Company to the extension of the road to its *terminus* on the *Ohio River*, and that it has power to apply its revenues to the re-construction of any part of the road; that it has power, in its discretion, to declare dividends on the net profits of the road, or it may apply said net profits to construction or re-construction, or generally, to the prosecution of the objects of the charter. That such determination does not affect the guarantee of the State on her

$3,000,000 loan to said Company, provided for by the act of 1835, ch. 395, because, by a proper construction of the acts of Assembly in relation thereto, that guarantee is to be satisfied out of the gross profits of the Company, before any portion of the profits can be applied to the extension, or re-construction of the road, or its repair. That the Company, as is conceded, in making a dividend, has no power to discriminate between its stockholders.

"That if the State could recover her claim of $15,000 in this suit, no demand on the Company, previous to the suit, was necessary to enable it to maintain this suit. That if the claim of the State should be limited to $5,000, then the State could not, in this action, recover the said sum of $5,000, without a previous demand.

"For the present, the court do not propose to decide whether the State can recover the whole sum of $15,000 claimed in this suit. We propose to postpone the consideration of this question, so important to the public, the bondholders, and the corporation, in the hope that the legislature may, by its action on the part of the State, consent to accept these bonds, and that they may by law declare such dividends on bonds in future, illegal, which if accepted by the Company, would be binding upon it.

"Should nothing be done by the General Assembly in reference to this recommendation, which the court respectfully make, we shall, at the next term of this court, proceed to decide this question, and in the opinion we shall pronounce, we shall give the reasons which shall govern us upon this and upon all the points in the record.

"The clerk of the court is directed to transmit a copy of the above to the President of the Senate, the Speaker of the House of Delegates, and the President of the *Baltimore and Ohio Rail-road Company.*"

A duly certified copy of the following resolutions of the General Assembly in reply to the above, passed February 23d, 1848, was sent to the court, and filed in the cause on the 1st March, 1848:—

"Whereas, by resolution No. 65 of December session, 1846, the Attorney General was directed to institute suit against the *Baltimore and Ohio Rail-road Company*, to recover the dividend of $15,000 which had been declared by that Company, payable, in part, in the bonds of said Company; and whereas, it is understood, that said suit was brought, as directed by said resolution, and that the same has been fully argued in the Court of Appeals at the present term, and inasmuch as the State has incurred the whole expense incident to the decision of this question, it is *therefore*

"*Resolved*, That it would be unjust to the State to take the bonds of this Company for the dividend declared, provided, the State should be entitled to receive said dividend in money.

"And whereas, in the view that the legislature will not again assemble for two years, it is important that the legislature should decide at the present session upon the course which the interest of the State will make advisable in reference to said dividend,—*therefore*,

"*Be it further resolved, by the General Assembly of Maryland*, That the Court of Appeals be respectfully requested to decide fully, all the questions which are presented for their decision in said case, in time to enable this legislature to act upon the subject of said dividend, after the delivery of such opinion by the court.

"*Resolved*, That a certified copy of the aforegoing preamble and resolutions be sent to the judges of the Court of Appeals, immediately after the passage hereof."

On the 4th March, the following opinion and order of the court was filed:—

"We are of opinion that if the State had accepted the bonds, they would have been valid in her hands; but the State having refused to accept its *quota* of the dividend declared, in the manner it was declared, has a remedy commensurate with the injury she may have sustained in consequence of such a declaration of dividend. But what shall be the remedy of the State, as the question has not been discussed, and is not before us, we forbear to decide.

"In this action of general *indebitatus assumpsit*, there can be no recovery of the $15,000, because there was not money in hand to divide that sum, and the dividend declared did not profess to be a dividend to that extent in money."

JUDGMENT AFFIRMED.

The opinion of the court was afterwards delivered at length, as follows:—

JUDGE CHAMBERS dissented in part, and delivered the following opinion:—

I do not concur in that portion of the opinion expressed by the majority of the court, which decides the right of the State to recover; or that which decides upon the contingent validity of the bonds issued or executed by the Company to the State, for $10,000.

The questions, (in reference to this part of the case,) involved in the record and argued at the bar, were, first, whether the act of the Board of Directors in declaring a dividend in part payable in bonds, was a lawful exercise of authority, and obligatory on the State; and if not, then whether the present action could be sustained by the State, for the $10,000, the nominal value of the bonds.

The court has declared, that "no discrimination can be made between stockholders, in making a dividend."

It would seem to follow, necessarily, from this position, that, in this instance, the issue of bonds was unauthorized; and, if the President and Directors, by their charter, had no authority to issue the bonds, they are not obligatory on the stockholders, for whom the Directors were trustees.

The argument was not at all directed to maintain, or deny, the right of the State to recover the specific sum of $10,000, or any other sum, in any form of action other than that resorted to, and without the aid of an argument I am unwilling to go beyond the points necessarily arising in the cause, to decide questions, in regard to which difficulties are apparent to my mind.

MAGRUDER, J., delivered his opinion as follows:

The resolution of the Board of Directors, declaring a dividend payable partly in bonds, and in part in money, is in this suit made the plaintiff's cause of action;—the evidence of its claim.

The court has already decided, that, in this suit, the plaintiff cannot recover the $5,000, for the reasons then stated.

I am further of opinion, that the State cannot recover the $15,000, and this for the reasons stated by a majority of the court, and that the judgment of the court below must be affirmed.

It was because of the difficulties that this proceeding, on the part of the Board of Directors presents, and the very many important and interesting questions, to which that proceeding might give rise, that I united with my brethren in advising the course, which was suggested by us a few days since. If it had been adopted, it would have obviated the difficulties and the evils which too much discussion, or too much opinion, perhaps, will cause, and prevent any such evils in future.

Disappointed in this, I can only say that the judgment must be affirmed.

ARCHER, C. J., delivered the opinion of this court.

The following paper, purporting to be a declaration of dividend, made by the defendant in this case, has given rise to the present controversy.

"OFFICE OF THE BALTIMORE AND OHIO R. R. COMP'Y,
November 4th, 1846.

"The President and Directors have declared a dividend, on the stock of the Company, as standing on the books on the first day ——— 1846, of three dollars per share, payable on and after Friday, the 20th day of the present month, in the manner following, to wit: to all stockholders of less than fifty shares, cash, at the *Commercial and Farmers' Bank;* and to all stockholders of fifty shares and over, one dollar per share in cash, at the *Commercial and Farmers' Bank*, and two dollars per share in the Company's bonds, bearing interest payable quarterly, re-

deemable in twenty years, and deliverable to the stockholders at the office of the Company. J. J. ATKINSON, *Sec'y.*"

The Twentieth Annual Report of the Company, offered in evidence in this case, furnishes the basis and the reasons which actuated the Company in the above proceeding. In this report it is said, that the net revenue, including the receipts from the coal trade, after deducting the expenses of working and keeping the road in repair, amounted to the sum of $440,475 34. Of this sum, however, besides $65,749 64, (being principal and interest, and premium, in sterling bills,) on account of the debt due the *Messrs. Barings*, there have been applied, during the year, to the re-construction of the road, and to the construction of burthen cars adapted to the general trade, to improvements at the depots, and to right of way, to the purchase of locomotive engines, and to the construction of water stations, to the purchase of additional power and machinery for the accommodation of an increasing coal trade, and on account of a subscription on behalf of the Company, to the capital stock of the *Pittsburgh and Connellsville Rail-road*, the further sum of $284,184 76, making together $349,934 40, and leaving, of the net revenue of the year, at the disposal of the Board, the sum of $90,540 94, or about one and a quarter *per cent.*

It appears, by the same report, that the Board determined to raise the means for the re-construction of the entire length of the road between *Harper's Ferry* and *Baltimore*, by the sale of the Company's six *per cent.* bonds, payable in twenty years, and believing that a sufficient sum for this purpose might, in this way, be raised, in parcels, to meet their engagements, they directed thirty miles of the road to be immediately placed under contract.

The sale of the bonds, as contemplated, was not, however, effected—their price in the market not, in the opinion of the Board, justifying such sale, and they temporarily applied the revenues of the Company towards the consummation of this object, designing at the time, however, to reimburse the stockholders, and also to reimburse the stockholders, for such

amount of the annual revenues of the Company, as had theretofore been applied to enable the Company to provide the necessary power and machinery, to enable them to commence and carry on the coal trade.

Upon this principle, adding the sums applied from the revenue, for the re-construction of the road, and for the power and machinery for the coal trade, (after deducting the sum of $43,312 14, with which that trade had been credited,) amounting together to $146,816 05, to the residue of the surplus, to wit, $90,504 94, there would remain a net surplus of revenue of $237,356 99, expended and unexpended.

With the intention of carrying out the original design of reimbursing the stockholders, for such amount of revenue of the Company as had been applied, from time to time, to the purposes of the Company, above adverted to, and having only in hand cash to the amount of $90,504 94, it was determined that the sum of $146,816 05, expended as above detailed, should form the basis upon which the stockholders should be reimbursed, by bonds of the Company, to be issued in favor of the stockholders.

It appears from the evidence, that the money to pay the cash part of the dividend was deposited in the *Commercial and Farmers' Bank*, to be paid to all stockholders who might demand the same; and that the certificates of stock were in readiness, for delivery, for the other portion of said dividend, at the office of the Company in *Baltimore;* and that all the stock had been issued and delivered to the stockholders, in accordance with the terms of the resolution declaring the dividend, except the stock that was payable to the State; and also, that the entire dividend, in cash, had been paid, except the State's portion, and some small sums not called for, but not exceeding what usually remains unpaid, for a longer or shorter time, after every dividend.

The State, being a stockholder, and refusing to receive the dividend thus declared by the Company, as it was declared, has instituted this action to recover the amount of *three per cent.* in money, considering the dividend in the same light,

and as having the same legal effect, as if it had been declared in money, and not in money and bonds. The prayers of the plaintiff and defendant present the following propositions for the consideration of the court, so far as the charter is concerned.

1st. Had the Company a right to expend any part of its revenue for the re-construction of the road?

2d. Could it make such expenditure, absolutely, and without being bound to refund, or might it appropriate and agree to refund to the stockholders, in their discretion?

3d. Under the 19th section of the charter, are the Directors bound to divide only such part of the net profits, as they may deem proper? and is their judgment of what is proper conclusive upon the stockholders?

4th. Can they apply any portion of the net profits not divided, to any legitimate purposes of the Company?

The determination of these questions depends on the construction of the act of 1826, ch. 123, entitled, "An act to incorporate the *Baltimore and Ohio Rail-road Company;*" which act is the charter of this Company.

By the 14th section of this law, the purpose and object of the charter is disclosed. Its design is there declared to be, "to make a *Rail-road* from the city of *Baltimore* to some suitable point on the *Ohio* river;" by the 22d section of this act, the road was required to be finished within twelve years from the passage of the law; and by the 2d section, it is declared, that the capital stock of the Company shall consist of three millions of dollars.

In all questions of power, arising under an act of assembly granting a franchise of this description, the test of the existence of the power, is to be found in the inquiry, whether the same is expressly granted, or whether it is incidental to any express grant of power, and necessary to its accomplishment?

The 14th section declares, that "the President and Directors of said Company shall be, and they are hereby invested, *with all the rights and powers necessary to the construction and repair of a Rail-road, from the city of Baltimore to the Ohio river.*"

Here, then, is a sweeping grant of power, both to *construct* and repair, with no other limitation on its exercise, than that it shall be necessary to accomplish the one object or the other. *All right and power* to accomplish these objects are given, with no other limitation than that just adverted to.

Thus is the power conferred, and thus is the duty imposed, of constructing a Rail-road. For this purpose a capital is provided, of $3,000,000; and this power, and this duty, are to be exercised in no other way, looking to this section alone, than by the means placed at the disposal of the Company, that is, by its capital, and the products of its capital. It was certainly a part of the contract of the Company, when they accepted their charter, that they would make and keep in repair the road, though it required their whole fortune, which consists of their capital, and of the earnings of their capital. These duties the Company undertook to perform, with the means placed by the charter at their disposal; subject, however, to the right, conferred by the 19th section, at the discretion of the President and Directors to divide the net profits. To accomplish a work of this vast magnitude, requiring a costly Rail-road to be made over a difficult and mountainous country, required enlarged powers; and they were liberally given, in the section under consideration. It has been urged, that it is an established rule that every corporation is limited in its powers by the object to be accomplished, and if there be a specification of the means for accomplishing a particular object, then such specification excludes all others. The rule is admitted. But we do not consider it as applicable to this case. The means for accomplishing the object, it is said, are provided by the 13th sec. of the act. That section is as follows:

"That if the capital stock of said Company shall be deemed insufficient for the purposes of this act, it shall and may be lawful for the President and Directors of the said Company, or a majority of them, from time to time to increase the said capital stock, by the addition of as many shares as they may deem necessary, for which they may at their option cause subscriptions to be received in the manner prescribed by them,

or may sell the same for the benefit of the Company, for any sum not under their par value; and they, or a majority of them, shall have power to borrow money for the objects of this act; to issue certificates, or other evidence of such loans; and to pledge the property of the Company for the payment of the same and its interest."

The above section undoubtedly does specify powers for the purpose of accomplishing the object,—that is, it gives the power to increase the capital of the stock, on the terms therein mentioned, and the power to borrow money.

But such specific powers, given as a means of accomplishing a power, however it might exclude other means of accomplishing the construction of a road, furnishes most certainly no limitation of a grant of *all powers*, limited only by their necessity; and this, we have seen, is the grant of power in the 14th section.

It is obvious that the legislature, having granted the specific powers referred to in the 13th section, were apprehensive that, by these means, the great object had in view by the act could not be accomplished; they therefore, the more effectually to carry out these purposes, by the 14th section endowed the Company with *all rights and powers* necessary to make and keep the road in repair. And in so doing they had a wise foresight; for, if the Company were to be made dependent on the means provided by the 13th section, for constructing the road, it might be questionable whether the great purpose of the act could ever be effected. The evidence in the cause shows us that, even in 1846, the stock of the Company could not be sold but at ruinous sacrifices; and this suit apprizes us that, even with the aid of extensive liens, money could not be borrowed but upon unfavorable terms.

The 19th section interposes no difficulty in the way of the above construction. That section we will advert to. It is in the following words:

"*And be it enacted*, That the said President and Directors shall annually, or semi-annually, declare and make such dividend *as they may deem proper*, of the net profits arising from the

resources of the said Company, after deducting the necessary current and probable contingent expenses; and that they shall divide the same amongst the proprietors of the stock of said Company, in proper proportions to their respective shares."

There is clearly nothing in this section which is in any manner imperative on the Company to declare dividends of their net profits. Their duty is defined to make such dividend as *they may deem proper* from the resources of the Company. If, in the honest exercise of their duties, looking to the whole interest of the Company, they deemed that the net profits should be otherwise applied, to accomplish or further the objects of the act of incorporation, they were at liberty to withhold a dividend.

The design of this section was, to define what was to be the subject of a dividend, and to prescribe the mode of dividing among the stockholders, and to allow a dividend from time to time, if the President and Directors deemed it proper.

If we are right in our construction of this section of the act, then this section strengthens our interpretation of the 14th section. If they are not compelled to divide the net profits, but may retain, then such retention must be to accomplish the objects designated in the 14th section. They could apply them to nothing else legitimately.

The 18th section of the charter, which authorizes the President and Directors to purchase, with the funds of the Company, and place on any *Rail-road constructed by them under the act*, all machines, wagons, vehicles, or carriages of any description, which may be necessary or proper for transportation on said road, does not militate against the construction which we give to the 14th section. This section itself takes a distinction between *the construction* of the road, and the motive power and vehicles for transportation; and however true it may be, in the language of the President of this Company to the committee of ways and means, that "professionally, *construction* comprehended the whole cost of not only making the railway, but of stocking it with motive power, machinery, and stations of every kind, and also any new appurtenances of the same description

that might from time to time be needed;" still, it seems to have been supposed by the legislature that, to enable the Company to purchase the motive power, &c., some further authority was necessary, and out of abundant caution this power was given by the 18th section. That the section directs the purchase to be made out of the funds of the Company cannot affect the question. The funds of the Company are its entire resources, comprehending its capital and its receipts; and the authority conferred by the section stands as it would have stood if there had been a general power to purchase, without any reference to the funds of the Company.

But it is urged, that if the net profits of the Company can be applied to the construction of the road, or to extraordinary works of repair there would be no profits left to secure the guarantee provided by the 9th section of the act of May session, 1836.

But we think the true construction of that section is, that this guarantee is to be satisfied out of the gross profits of the Company.

This section provides, that the interest on each instalment of stock subscribed shall, after the lapse of three years from the time of payment by the State, be paid out of the *profits* of the work. The term *profits* may mean *gross profits or net profits.* Which it means must be determined by its association, and by the whole clause. Now, in the same sentence, the terms *clear annual profits* are used. Then, in another part of the same section, and in the same sentence, on a contingency therein mentioned, the language is, that the State shall be entitled to receive a perpetual dividend of six per centum per annum, out of the profits of the work, *as declared from time to time.* So that the term profits, as used in the first part of the sentence, is used without limitation or qualification, and wherever afterwards it is used, it is qualified and defined to mean *clear annual profits*, or *as declared* from time to time, which declaration of profits, as declared from time to time, would be only from the *clear annual profits* by the charter. It then appears, that they have used the term profits as contradistinguished

from *net profits*, or *clear annual profits*, or *profits declared from time to time*. And as this has been done, we think the inference is clear, that by the term profits, as first used in reference to the guarantee, they meant gross profits. This guarantee is in no manner impaired by the act of 1838, ch. 386.

The above views dispose of the various propositions contained in the prayers, except the question arising under the second proposition, as to the ability of the Company, at its discretion, to appropriate its net revenue, and agree to refund the same to its stockholders, or to make such appropriations absolutely to the purposes of the road.

We have before seen that the Company, in the honest discharge of its duties, may, under the charter, appropriate the net revenue of the Company to the purposes of the charter; it is, we think equally clear, that they may, having appropriated the net revenue of the Company to the purposes of the charter, designing at the time to repay them, agree to refund the same to the stockholders.

If designing to make a dividend of the net profits, they have used them for the purposes of the Company, intending at the time to return them to the stockholders, as was the case in the cause before the court, as is abundantly evident from the Twentieth Annual Report, which is in evidence before the court, we think there is nothing in the charter which would prohibit the Company from refunding the amount thus used by them to the stockholders. The character of the act ought to be determined by its intention.

The legislature would not, certainly, have designed, that if the Company had on hand $500,000 of net profits, and designing to divide the same, and should from any cause connected with the prosecution of the enterprise, have required the use of $100,000, that they must, in order to carry out their design of dividing the said $500,000 among their stockholders, abstain from the appropriation of any part of the net profits temporarily to that object, and resort to a loan for the purpose, keeping the net profits idle in their coffers, until the period of the declaration of a dividend should arrive.

We are satisfied they might agree to refund the net profits which they may have used, and might, under the powers granted to them by the charter, borrow money to supply the place of that which had been used, and that they might borrow from the stockholders as well as from any one else, and that they had a perfect right, with the consent of the stockholders, to treat the money thus used as a loan, and for this purpose, might pass to the stockholders, who were willing to receive them, their bonds. The *second*, *third* and *fourth* prayers of plaintiff give rise to other questions.

The propositions contained in these prayers, may be reduced to two.

1st. That the mode of payment specified by the advertisement, was not obligatory on the stockholders, and the plaintiff was entitled to recover.

2d. That the plaintiff could recover the whole of said dividend, though the Company had not sufficient cash on hand to pay the same.

We agree with the first part of the first proposition, which asserts that the mode of dividend was not obligatory on the plaintiff. The plaintiff was certainly not bound to accept the bonds which the Company proposed to deliver. The State, if she pleased, might refuse the bonds, and decline to become a lender to the Company, and certainly the Company could not become a borrower from the State without the State's assent. A forced loan could not be contended for, and a valid loan requires the assent of all the parties. But, although the State was not bound by the mode of dividend, it will not follow that the State is entitled to recover; the reason which conducts us to this conclusion, will be assigned in discussing the second proposition.

Now, as to the second proposition, which asserts that the State can recover the whole amount of the dividend, although the Company had not cash on hand sufficient to pay the dividend, and did not intend to declare a cash dividend of three *per cent.*, but of one *per cent.* only,—we remark that the plaintiff has certainly no standing in court, except upon the

dividend. The relation of debtor and creditor cannot exist as between the Company and the stockholder in this respect, until the dividend is made. The plaintiff, by the institution of this action, affirms the dividend, and he must take it as it is.

The relation of trustee and *cestui que trust*, exists in a qualified sense, as between the President and Directors and the stockholders; and the funds which may be in the hands of the President and Directors, in which the stockholders may have an interest cannot be sued for in an action of general *indebitatus assumpsit*, unless a dividend has been declared. It is immaterial in our view of the subject, whether the declaration of a dividend constitutes a contract, or is to be considered in the light of the performance of a duty. In either case, it is to be taken as it emanates from the Board. A part of it cannot be taken and the rest discarded. It cannot be said you have declared three *per cent.* and we will have the money, although in the very declaration, they say they can only pay you in the liabilities of the Company. All the evidence in the cause demonstrates, that all the net revenue of the Company, designed by the Company for its stockholders, under the provisions of the 19th sec. of the charter, except the cash on hand, at the time of the dividend, was used in the works of the Company; but with the design of repaying it to the stockholders; and that it should, with the assent of the stockholders, assume the shape of a loan. This, we have seen, it was competent for them to do, with the consent of the stockholders; but any stockholder might refuse to receive the liabilities of the Company, thus offered, and might treat the dividend, so far as he was concerned, and so far as the declaration of dividend proposed the delivery to him, of the bonds of the Company, as an illegal dividend; and to the extent, the State has been damnified as a stockholder, by the accomplishment of this loan from the other stockholders, she is entitled to redress, but surely not in the form of an action of general *indebitatus assumpsit.*

Is it not obvious, that if the State is allowed to treat this advertisement as a cash dividend, she is producing the very

injustice of which she complains? She would receive her three *per cent.* in money, and when all the other stockholders above fifty shares, had received but one *per cent.* and the residue in bonds. It is true, the President and Directors have discriminated in this advertisement, between the large stockholders and the small, giving to the latter three *per cent.* in money, and to the others, money and bonds. This, it is conceded, the charter did not justify. But this distribution to the small stockholders, was a greater proportion of cash, than they were entitled to, looking to the amount of cash in hand for division. The illegal payment to the small stockholders of more cash than from the unexpended funds they were entitled to, could surely furnish no reason, why the State should receive a like sum. If the State, as a stockholder, has received injury by such payment, she no doubt has her remedy, but not that which has been pursued.

The question arising, under the fifth prayer of the defendant, and the last prayer of the plaintiff, is, whether there can be any recovery in this case, of the $5,000, which was the amount of the cash dividend, payable to the State, wtihout a demand being made, either of the Company or its authorized agents, for payment. We are clearly of opinion, that such demand was necessary, before a right of action would exist, on the part of the plaintiff, to recover this dividend. The establishment of the principle, that suits could be instituted without demand for dividends, declared by banking and other corporations, would greatly impair the value of stock held therein, by rendering it necessary to employ agents, to hunt up the stockholders, in various parts of the State, or the Union, in order to prevent a multiplicity of suits, or on a failure to do this, suits, and of consequence, costs might be multiplied to an alarming extent. Such a doctrine has, certainly, never been supposed to exist. Dividends are paid when called for, and we apprehend, that limitations would not run until demand was made.

Moreover, interest would not be chargeable against an incorporation, on dividends declared, until a demand was made,

which could not be so, if the Company was liable without demand.

The decision of this court, in 1 *G. & J.* 425, on the principle which it establishes, bears a strong affinity to this case. There it was decided, that a trustee, ordered by a Court of Chancery, to pay claims allowed by the Chancellor, would not be liable to a suit, until, not only notice should be given to him of the order, but demand made upon him by the claimant, for payment. We do not think the Company stood in the situation of a common debtor, whose business it is to look to a compliance with his engagement. As regards the argument, *ab inconvenienti*, we think it would apply as strongly to the case before the court, as to that case.

JUDGMENT AFFIRMED.

STATE OF MARYLAND *vs.* CHARLES W. DORSEY, *Executor of* NICHOLAS WORTHINGTON OF JNO.—*June*, 1848.

The bequest of freedom to a slave, is a legacy within the meaning and operation of the act of 1844, ch. 237, and therefore subject to the tax imposed on legacies by that act.

APPEAL from the *Orphans Court of Howard District of Anne Arundel County.*

Nicholas Worthington of Jno., late of *Howard District*, by his will, duly executed and admitted to probate by the Orphans Court of said District, manumitted and set free all his negro slaves, and appointed the appellee his executor. The slaves thus manumitted were appraised in the inventory at $15,433, on the 4th December, 1847. The State, by its attorney, filed a suggestion in said court, alleging among other things, that the State was entitled to the tax of two and a half *per cent.* under the act of 1844, ch. 237, upon the appraised value of the said negroes, and praying the court to order the executor to pay said tax to the Register of Wills, for said District.

The executor in his answer, admitted the facts, but denied that the gift of freedom to a negro slave, is such a legacy as is liable to be imposed by the act aforesaid. The Orphans Court thereupon "ordered and adjudged that the gift of freedom to the negroes in question, is not liable to the tax imposed by the act of 1844, ch. 237." From this order, the State appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE and MARTIN, J.

By J. T. B. DORSEY and RICHARDSON, *Attorney General*, for the appellant, and

By E. HAMMOND and WM. H. G. DORSEY for the appellee.

SPENCE, J. delivered the opinion of this court.

The question in this case which this court is to determine, is, whether the negro slaves manumitted by the last will and testament of *Nicholas Worthington of Jno.* are legacies within the meaning and operation of the Act of Assembly of 1844, ch. 237, sec. 2, which imposes the obligation and duty on the executor to pay to the Register of Wills of *Howard District* two and a half *per centum* on the appraised value of said slaves, as filed in the register's office in *Howard District*.

The act of 1844, ch. 237, by the provisions of its first section, subjects all estates, real, personal and mixed, which pass by last will and testament to devisees, legatees or distributees, other than "to or for the use of father, mother, wife, children and lineal descendants born in lawful wedlock," to a tax or duty of two and a half *per cent.* on every $100 of the clear value of such estates, to be paid to the use of the State. Executors and administrators can only be discharged from liability for the amount of such tax, by paying the same over for the use of this State, as directed by the act of 1844, ch. 237.

The second section of the act of 1844, ch. 237, enacts "that from and after the first day of June (then) next, all and every executor and executors, administrator and administrators, to

whom letters testamentary or of administration shall be granted, shall before he, she, or they pay any legacy or distribute the shares of any estate passing as aforesaid, (to wit—collaterally,) pay to the Register of Wills of the proper County, or of *Howard District*, whose bonds shall be liable therefor, two and a half *per cent.* out of every $100 they may hold for distribution among the distributees, grantees, donees or legatees, and at and after that rate, for any less sum for the use of the State;" and when any species of property other than money or real estate shall pass as aforesaid, the tax or duty shall be paid on the appraised value thereof, as filed in the register's office.

It was insisted by the counsel for the appellee, that the gift of freedom to one who was a slave by will, was not a legacy, and therefore not within the provisions of the act of 1844, ch. 237. It will not be denied, (for it cannot be successfully,) that if a testator by his will bequeath a slave to another person, who is in law capable to take, that the slave is a legacy to the legatee.

In *Maryland*, from the act of 1752, ch. 1, to the act of 1796, ch. 67, the owners of slaves had no power to give freedom to their slaves by last will and testament, nor had slaves the capacity to take freedom in this way: this act gave the power to owners, and removed the incapacities of slaves under certain defined limitations.

Slaves in *Maryland* are both by the letter and policy of the law, property, and subject to the same rules of law as other personal property, unless in cases where discriminations have been made by the statutes of the State, which do not affect this question. Indeed, the law has gone so far as to presume every negro a slave to some one, until the contrary appear.

It is therefore our opinion that the manumission, or bequest of freedom to a slave by last will and testament, confers on such slave the identical rights, interests and benefits, which would pass, if the testator had bequeathed the same slave to another person, and that such bequest to another would be a legacy. The conclusion, therefore, that a bequest of freedom to a

slave is a legacy, is as clear as that things which are equal to the same thing, are equal to one another.

The bequest of freedom to the slaves are legacies, and the executor is liable for the tax or duty on their appraised value. The decree in this case is reversed, and the cause remanded.

DECREE REVERSED AND CAUSE REMANDED.

THE METHODIST PROTESTANT CHURCH, *East Baltimore Station*, *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE. *June*, 1848.

The legislature, by the acts of 1817, ch. 148, and 1838, ch. 226, conferred certain powers upon the corporate authorities of the city of *Baltimore*, in relation to the opening and widening of streets in said city. *Held*,

That it is not essential to the validity of an ordinance of said corporation, executing the powers thus conferred, that it should state or indicate the act in execution of which it was passed.

If no power be stated as its basis, the ordinance will be regarded as emanating from that which would have warranted its passage; and if two such powers exist, it may be imputed to either, in conformity to which, its provisions show it to have been adopted.

The power to determine whether or not the public welfare and convenience require the widening of any particular street, is, by the act of 1838, ch. 226, vested *exclusively* in the *Mayor and City Council*, and whether their judgment be right or wrong, is no subject for revision or correction in a court of equity.

When notice to all persons interested in the opening or widening of any street, has been duly given by publication, as required by the act of 1838, ignorance thereof, in any party, can afford him no ground for relief, either in equity, or by appeal to the City Court. The law imputes notice, and will not admit testimony to disprove it.

The Court of Chancery, except as an appellate tribunal, never interferes to arrest, or set aside, the proceedings of courts of law, or other judicial tribunals, upon the ground of legal error therein, unless prompted by conscience, to prevent wrong and injustice, but leaves the party complainant to his remedy at law.

Where a party fails to avail himself of the means provided by law, for the redress of the wrong of which he complains, he is without remedy in a court of Chancery.

The law having given to parties considering themselves aggrieved by the proceedings of the street commissioners of the City of *Baltimore*, an appeal to *Baltimore* City Court, they can sucessfully seek redress only in that tribunal.

The testimony of but one witness is clearly insufficient to overthrow the responsive and positive denials of an answer.

APPEAL from the Court of Chancery.

On the 28th April, 1847, the appellants, the trustees of the *Methodist Protestant Church, East Baltimore Station*, filed their bill in the equity side of *Baltimore* County Court, in which they allege that in their corporate capacity, they are the owners of a certain lot of ground situated on the corner of *Pitt and Aisquith* streets, in the city of *Baltimore*, on which is erected a building regularly used as a place of public worship, by the religious society embodied under the said corporate name. That this lot and building was so owned and occupied, at the time the *Mayor and City Council of Baltimore*, passed an ordinance providing for the opening and widening "*Little Aisquith* street," approved on the 20th April, 1846, and has ever since been so owned and occupied. That by the act of 1817, ch. 148, full power was given to said *Mayor and City Council* to open, extend, widen or straighten any street in said city, "upon the application in writing, of the proprietors of not less than two-thirds of any property which may be intended to be taken for such purpose," and by the act of 1838, ch. 226, like power was given them, to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part any street in said city, "which, in their opinion, the public welfare or convenience may require;" that on the 9th March, 1841, the said *Mayor and City Council* passed an ordinance entitled "an ordinance for exercising certain powers vested in this corporation, in relation to streets in the city of *Baltimore*," by which a board of commissioners was created, with power and authority according to the provisions of the acts of Assembly, and ordinances of the corporation of said city, to open, &c., any street, &c. in said city, and to assess and tax the expenses thereof as thereby directed, "subject, nevertheless, to all such restrictions exempting certain descriptions of property from assessment, as are contained in any law of this State, or in this ordinance, or any other ordinance of this city;" that by the laws of this State and ordinances of the city of *Baltimore*, houses for public worship are exempt from any tax to the State or the city.

That afterwards on the 20th April, 1846, said *Mayor and City Council* passed another ordinance providing for the widening of "*Little Aisquith* street," by which, among other things it was ordered that the commissioners for opening streets, should proceed in all respects in the widening of said street, agreeably to the provisions of the said ordinance of the 9th March, 1841, but that by said ordinance of the 20th April, 1846, it was not declared, and does not in any manner appear whether the widening of said street was determined on, upon the application in writing of the proprietors of not less than two-thirds of the property intended to be taken in so widening said street; or whether in the opinion of the said *Mayor and City Council*, the public welfare and convenience required it; and that upon an inspection of the premises and of the plats made by said street commissioners, it manifestly appears that the widening of said street, as proposed, will not conduce to the public welfare and convenience; that said street commissioners not regarding the acts of Assembly and ordinances of the said city corporation, and the rights, privileges and exemptions of your orator, did not give the notice of sixty days required by the ordinance of March, 1841, before entering upon the duties assigned them, and did not in any manner conform thereto, but did assess the said lot and building a large sum of money, as and for a benefit conferred by the widening of said street, and that in other particulars their proceedings were erroneous and contrary to law, and in violation of the rights of your orator; that the collector of taxes for said city, acting under the direction of said city corporation, was about to sell said property for the payment of said tax. The bill then prays for an injunction restraining said corporation and its agents from attempting further to enforce said tax against your orator, and that the proceedings of said street commissioners may be quashed, and for general relief. On the same day the injunction was granted as prayed by *Baltimore* County Court.

The answer of the *Mayor and City Council of Baltimore* to

this bill, filed on the 9th July, 1847, admits the complainant to be a corporation and owner of the lot and building mentioned in the bill, but denies that said building is regularly used as a place of public worship by the religious society embodied under the corporate name of the complainant, and avers that said building, which is not connected with the complainant's meeting house, but separated from it by a private alley, consists of a two story brick house, the upper story of which is occupied by the sexton of complainant and his family as a dwelling house, and the lower story of which is used for the Sunday School of complainant and its class meetings and prayer meetings. That complainant so used and occupied said building at the time of the passage of the ordinance of the 20th April, 1846. Respondent admits the passage of the acts of Assembly and the ordinance of the 9th March, 1841, referred to in the bill, and also that of the 20th April, 1846, for the widening of "*Little Aisquith* street," and avers that the public welfare and convenience required the widening thereof, and that the ordinance so passed, was passed because in the judgment of the respondent it was required by the public welfare and convenience. That the street commissioners entered upon their duties in regard to the widening of said street on the 20th April, 1846, and gave notice by advertisement inserted on the following day, and afterwards published in two of the daily newspapers published in the city of *Baltimore*, that they would proceed on the 24th June next ensuing, at 4 o'clock in the afternoon, at their office, to exercise the power and perform the duty assigned them, in regard to widening *Little Aisquith* street, agreeably to the provisions of an ordinance, entitled "An ordinance for the widening of *Little Aisquith* street," and of the ordinance, entitled "An ordinance to provide for exercising certain powers vested in this corporation, in relation to streets in *Baltimore* city," and according to appointment, proceeded to perform their said duty, and in so doing, assessed upon the said lot and building of the complainant, the sum of seventeen dollars, as and for a benefit conferred by the widen-

ing of said street,—and that the collector of this corporation is bound and will collect said assessment, unless restrained by this court. That this corporation in passing said ordinances, have, in all respects, observed the requisitions of the act of 1838, referred to in the bill, and that said street commissioners have strictly followed the said act and ordinances, and that all acts and proceedings in the premises are well and lawfully done, and should be enforced. Respondent further saith, that by the ordinances aforesaid, an appeal to *Baltimore* City Court is allowed to all persons improperly assessed by the commissioners of streets of the city of *Baltimore*, and that in said court, and not here, the case set forth in said bill is cognizable; and this respondent denies the jurisdiction of this court in the premises, and prays to have benefit of this objection, as if formally pleaded.

The deposition of *Zaccheus O. Bond*, taken before a justice of the peace, by consent of parties, was filed in the cause. The witness deposes, that the building spoken of is used for public worship, and also for a Sabbath School. A room up stairs is occupied by the sexton of the church. The room down stairs is open twice a week for public worship, and almost every evening in the week, (Sundays excepted,) it is open for business appertaining to the church. The public worship to which he refers, is prayer-meeting one night in the week, preaching another night. The class-meetings are held there through the day, nearly every day. The building is never open for public worship when the church is open. The attendance in this building is fewer than in the church. The prayer-meetings and preaching in this building are open acts of worship, and parts of the religious services of the *Methodist Protestant Church*.

The cause was then removed to the Court of Chancery, and submitted upon motion to dissolve the injunction. The Chancellor (JOHNSON) on the 29th July, 1847, dissolved the injunction, and delivered the following opinion:—

The bill in this case was filed on the equity side of *Bal-*

timore County Court, and subsequently transferred to this court, under the provisions of the act of Assembly for that purpose.

It seeks to restrain, by injunction, the *Mayor and City Council of Baltimore* and their agents, from proceeding to collect a tax and assessment, which had been imposed upon the property of the complainant, as and for a benefit, which in the judgment of the street commissioners of the city of *Baltimore*, had been conferred upon their property by the widening of *Little Aisquith* street. The interposition of the court is asked upon the ground, that the commissioners in imposing the tax, have acted in disregard of the acts of Assembly, the ordinances of the *Mayor and City Council* in the premises; and especially in violation of those provisions of the laws and ordinances, which exempt this property of the complainants from taxation. The injunction was ordered, and after answer filed, the proceedings were transferred to this court, in which the motion to dissolve has been argued by the solicitors of the parties.

The bill alleges, that upon the lot of ground upon which the tax has been assessed, there is erected a building, regularly used as a place of public worship, and it is contended, that such property is, by the laws of this State and the ordinances of the city, exempt from taxation for any purpose. The answer denies the allegation as to the use of the building, and some proof has been taken in regard to the character of the building, and its use as a place of public worship. And the answer also insists, that by the ordinances of the city upon the subject of opening and widening streets, an appeal to *Baltimore* City Court is allowed to all persons improperly assessed by the street commissioners, and that in that court, and not here, the case made by the bill is cognizable,—and, therefore, the jurisdiction of the Chancery Court is denied.

The Chancellor concurs in this view of the subject, and for that reason, forbears to express an opinion upon the other questions which have been argued by the counsel.

It was said by the court of Appeals, in the case of *Gott and Wilson vs. Carr*, 6 *Gill & Johns.* 312, that "it is a salutary principle of law, that every person is bound to take care of, and protect his own rights and interests, and to vindicate them in due season, and in the proper place;" and because the complainant in that case did not vindicate his rights in due season, and in the proper place, the interposition of the Chancery Court in his favor was refused.

I think the principle of that case applies to this. The act of 1838, ch. 226, which gives to the corporate authorities of *Baltimore*, to lay out, open and widen streets, &c directs among other things, that they shall have power to provide for granting appeals to *Baltimore* City Court, from the decisions of the commissioners, and to secure to every person interested in such decisions, the trial by jury, on application within a reasonable time. And the 9th sec. of the ordinance of the City, No. 10, of 1841, approved on the 9th March of that year, which is an ordinance for exercising the powers vested in the city by the act of 1838, ch. 226, confers upon persons who may be dissatisfied with the assessment of damages or benefits, which may be made by the commissioners, the right of appeal within a limited and reasonable time, to the judges of *Baltimore* City Court, and gives to the said judges, power to hear and fully examine the subject, and decide thereon, with a provision for summoning a jury, to try any question of fact. And a similar provision in reference to the right of appeal, is made by the 9th sec. of the ordinance, No. 59, of 1846.

The street in question was widened under ordinance, No. 49, of 1846, which directs that the street commissioners shall proceed, in all respects, in the widening of the street, agreeably to the provisions of the ordinance of the 9th March, 1841, and consequently, the right of appeal to the City Court, secured by the latter ordinance, might have been enjoyed by any person conceiving himself aggrieved by the judgment of the commissioners. It seems to me, that the remedy thus provided for the examination and correction, (if erroneous) of

the proceedings of the commissioners, should have been taken by these complainants, and that they have no right, passing by that remedy, to invoke the extraordinary power of a Court of Chancery, to interpose by way of injunction for their relief. The injunction will consequently be dissolved.

From this order, the complainant appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE and MARTIN, J.

T. P. SCOTT for the appellant, insisted:—

1st. That the ordinance of the 20th April, 1846, and the proceedings of the city commissioners do not show affirmatively, nor does it appear negatively, whether *Little Risquith* street was to be opened and widened under the act of 1817, on the application of two-thirds of the proprietors of the ground, or under the act of 1838, because of the requirements for public convenience. There is no evidence of any application of proprietors under the act of 1817. It manifestly appears from the terms of the ordinance of the 20th April, 1846, that the public convenience will not be promoted by the proposed change. The city commissioners did not proceed, in conformity with the provisions of the ordinance of the 9th March, 1841, as directed by the ordinance of April, 1846. They did not give sixty days notice, as required by the former ordinance, and assessed the property of the appellant contrary thereto.

2d. That though provision is made under said acts and ordinances for an appeal from the decision of the commissioners, yet the appellant is not thereby precluded from his remedy by injunction; because, it had no actual notice in fact of the assessment complained of, until the attempt was made to enforce it by sale of the property. The whole proceedings of the city commissioners being *coram non-judice*, the appellant was not bound by any mere constructive notice. Though in an action of ejectment, brought by any purchaser of this pro-

perty, the appellant might defend itself at law; yet to avoid circuity of action, needless and expensive litigation, and for more prompt, efficient and adequate justice under the peculiar circumstances of this case, it is entitled to its remedy by injunction.

CAMPBELL and WILSON for the appellee, contended:—

1st. That the notice given by the commissioners was given in conformity with the act of 1838, ch. 226, in its 2d section, and also with the 6th section of the ordinance of 1846, No. 59. That the building assessed is no house for public worship, and if it were, is not exempt from an assessment for benefits.

2d. That the remedy of the party is misconceived, even if the objections above answered were good. The City Court of *Baltimore* being provided for by law to entertain such questions.

DORSEY, C. J., delivered the opinion of this court.

Various grounds have been assigned by the complainant, why the injunction issued in this case, should not have been dissolved. And first, it is insisted, that the ordinance, of the 20th April, 1846, No. 49, for the opening of *Aisquith* street, is invalid, because it is not apparent on its face, whether it was passed in execution of the powers delegated to the *Mayor and City Council of Baltimore*, by the act of 1817, ch. 148, or by the act of 1838, ch. 226. It is not essential to the validity of an ordinance, executing powers conferred by the legislature, that it should state, or indicate, the power in execution, of which the ordinance was passed. If it state no particular power, as its basis, judicial courtesy requires that we should regard it as emanating from that power, which would have warranted its passage. If two such powers exist, it may be imputed to either; in conformity to which its provisions and prerequisites shew, that it has been adopted. If, in these respects, in accordance with both, no incongruity or injustice can result, in regarding it as the offspring of both, or either of

the powers. It is, therefore, no fatal objection to the proceedings of the city commissioners, that they do not, therein distinctly unfold under what act of Assembly, or ordinance their powers were exerted. If sustainable on either, their proceedings cannot be invalidated on that ground, in a court of equity.

The allegation and offer to prove in the bill, that the public welfare or convenience does not require the widening of *Aisquith* street, furnishes no ground for relief, by the interference of a Court of Chancery. By the act of 1838, ch. 226, the determination of that question is exclusively vested in the *Mayor and City Council of Baltimore;* and whether their judgment be right or wrong, is no subject for revision or correction in a court of equity.

The appellant seeks to sustain the injunction issued in its behalf, on the ground, that it "had no actual notice in fact of the assessment complained of, until the attempt was made to enforce such assessment by a sale of its property." If such fact were at all material, it is a sufficient answer to it, to state, that it is unsustained by any proof; and that the bill discloses no such ground for equitable relief; and that for aught appearing therein, it might be true, that the complainant had full knowledge of every proceeding of the city commissioners at the time it occurred: and could, in the mode prescribed by the act of 1838, by an appeal to the City Court of *Baltimore*, have been amply protected and redressed against all the illegality and injustice of which it now complains. But, it is immaterial whether such "actual notice in fact" were given to, or possessed by the complainant or not. By the act of 1838, the legislature have provided the mode, by which all persons are to be notified, whose interests are to be affected by the widening, opening, or straightening of streets in the city of *Baltimore;* and the time during which such notice shall be published in the newspapers. Which being complied with; ignorance thereof, in any owner on whose property benefits have been assessed, is his misfortune or his fault, but can furnish no

ground for relief to him, either on a bill in equity, or an appeal to the City Court.

Before the *Mayor and City Council of Baltimore* could proceed to execute the powers vested in them by the act of 1838, at least sixty days notice must be given of any application, which may be made for the passage of any ordinance, by advertisement, in at least two of the daily newspapers in the city of *Baltimore*. And "before any commissioners, appointed by any ordinance to be passed in virtue of this act, shall proceed to the performance of their duty, they shall give notice in at least two of the daily newspapers in the city of *Baltimore*, of the subject of the ordinance, under which they propose to act, at least thirty days before the time of their first meeting, to execute the same." *And it is further enacted*, "That upon the return of any assessment to be made under any ordinance, to be passed in virtue of this act, the register of the city of *Baltimore*, shall cause a copy of said assessment to be published for thirty days, in at least two of the daily newspapers of said city." It is not pretended that all these publications have not been regularly made pursuant to the provisions of the act of Assembly. Against the validity of such proceedings, a want of notice in point of fact can form no objection. The law imputes notice, and will not admit testimony to disprove it, in a case like the present. The time for an appeal from any such assessment, is thirty days after the register's publication.

The ordinance of 9th March, 1841, No. 10, sec. 6, requires sixty days previous notice of the meeting of the commissioners to discharge their duties, to be published in at least two daily newspapers of the city of *Baltimore:* whereas, the act of 1838, in virtue of which that ordinance was passed, required the publication of such notice for but thirty days. Without deeming it necessary to inquire, whether the commissioners have not legally executed their powers, by giving the notices specified in the act of Assembly, it may be sufficient to say, that this objection, as to the time during which the notice was given, is, of itself, of a purely legal or technical

character; and it not being even pretended, that the complainant was damnified thereby, it forms not the slightest ground for equitable relief; much less for the interposition of a court of equity, by way of injunction. A Court of Chancery, except when acting as an appellate tribunal, never interferes to arrest or set aside the proceedings of courts of law, or other judicial tribunals, upon the ground of legal error therein, unless prompted by conscience to prevent wrong and injustice; but leaves the party complainant to his redress in a court of law.

As an authority that an appellant having failed to avail himself of the means provided by law for the redress of the wrong of which he complains, (the means in this case being an appeal to the City Court,) is without remedy in a Court of Chancery. See the case of *Gott & Wilson vs. Carr*, 6 *G. & J.* 312.

Another, and it is conceived, a conclusive objection to the injunction issued in this case, is, that by the 9th section of the ordinance of March 9th, 1841, No. 10, and of May 15th, 1846, No. 59, on an appeal from the proceedings of the commissioners, the City Court are authorized, after an examination into the same, in the mode therein pointed out, to amend or supply all defects and omissions in the return and proceedings of the commissioners, "and alter, modify and correct the said record of proceedings in all, or any of its parts," as it "shall deem just and proper." To the Court of Chancery or County Court, sitting as a court of equity, no such power is delegated; nor can it be lawfully or judiciously exercised by those tribunals. To persons aggrieved by the proceedings of the commissioners in cases like the present, the legislative enactments upon the subject have provided the tribunal and means of redress, and there only can it be successfully sought.

To sustain a court of equity, in the exercise of the power it has assumed, would, in effect, be conferring upon it appellate authority, where it is wholly incompetent to administer justice and render full and adequate relief to all concerned; on whose rights, if it act at all, it ought to abjudicate. There is no

time prescribed within which such an application must be made. A complainant may wait until the proceedings of the commissioners are, in part, or wholly, except as to himself, executed by the widening, opening, or straightening the street, and then apply for relief to a court of equity. To tolerate such an interference, as the present, would produce endless confusion and difficulty; and would be wholly inconsistent with, and subversive of the policy and design of the acts of Assembly, and ordinances of the *Mayor and City Council of Baltimore*, in relation to the widening, opening and straightening of streets, and would render, almost impracticable, if not annihilate the exercise of such a power.

But if it were conceded, that the case stated by the bill, warranted the issuing of the injunction, it was rightly dissolved by the Chancellor. The allegation that the property, charged with the assessment for benefits, was a house for public worship, was responsively and positively denied by the answer; and to disprove and overrule such denial, the testimony of but one witness was offered; which was clearly insufficient for that purpose.

Whether the testimony of that witness, unaffected by the answer, shewed the house in question, to be such a house for public worship as was included in the exemption contained in the ordinances referred to, it is deemed unnecessary to consider.

The order of the Chancellor dissolving the injunction in this case is affirmed with costs; and the bill of complaint of the appellant, is dismissed with costs, both in this court and the court below.

DECREE AFFIRMED.

Edward M. Kerr *vs.* Moses Potter.—*June*, 1848.

The appellant and appellee entered into an agreement in writing, by which the former agreed to employ the latter as salesman and clerk in his store, and allow him for his services, one-fourth of the net profits of the business, and which further declared "that thereby the said" appellee "is not made a partner in trade of the said" appellant, "but that the allowance of one-fourth of the net profits, after deducting expenses," &c. "is a compensation for the services of the" appellee "in lieu of clerk hire." *Held*,

That this agreement is conclusive, to show that the parties were not partners, *inter se*, and however the appellee may be held liable as to third persons, he has none of the rights and equities of an actual partner,—and therefore, has no more right to call for the interposition of a court of equity, on the ground of lien, than any other creditor of the appellant.

If he performed acts, or stood by and saw others perform them, which would render him liable to the creditors of the concern, the credit given was voluntary, and gave him no other equity than would result to any other person who should become responsible for the appellant's indebtedness.

There being here no controversy between creditors, but simply whether the appellee was the actual partner of the appellant, this case is not analogous to the case of *ex parte Digby* and *ex parte Buckston*, in 38 *Eng. C. L. Rep.* 495.

Appeal from the Court of Chancery.

The appellee filed his bill on the 8th September, 1846, alleging, that on the 23d January, 1846, the complainant and a certain *Edward M. Kerr* commenced, in the city of *Baltimore*, a wholesale and retail "*Queensware and China business*," under the name and firm of "*E. M. Kerr & Co.*" That the business of said firm was large and heavy, and the liabilities and obligations outstanding and unpaid are very considerable, as are also the debts now due the same, and the goods and merchandise in its possession. That said *Kerr* has been extensively engaged in business on his private and individual account, and on or about the 21st August, 1846, stopped payment on some of his paper given for his individual liabilities, and is now greatly embarrassed and wholly insolvent. That such insolvency has not been occasioned by the operations and business of said firm, which have been profitable, but by transactions and business on his individual and private account. That since he became

insolvent, he has applied and used a part of the property and means of the firm in payment of his individual debts, and that attachments have been issued by his individual creditors against the property and effects of said firm, and complainant believes said *Kerr* will, unless restrained by this court, further proceed so to apply and use the property and effects of said firm.

The bill further charges that *Kerr*, when said business was commenced, agreed to furnish all the capital required in its management, to furnish and keep up a full stock of goods necessary and proper therefor, and was to sign all bonds, notes or other obligations for the payment of money or performance of any contract connected with said business, and was to pay all the debts and liabilities of the firm, and have the management thereof. That complainant was to act as salesman and general clerk, and was to receive, for his services, one quarter of the net profits, after deducting all expenses, and interest on the capital at the rate of six *per cent. per annum*, and was to receive for his support from said concern $83 33 per month, afterwards increased to $100 per month, which monthly payments were to be advanced from the net profits, and deducted from complainant's one quarter share thereof at the end of each year, and complainant was not to be held responsible for the debts and liabilities of the firm, all of which were to be paid by *Kerr*. That immediately after the commencement of said business, complainant was held out to all persons dealing with said firm, as a partner, and as jointly liable with *Kerr* for the liabilities thereof. That *Kerr* caused signs to be placed at the store in *Baltimore* street in said city, which evidenced to all persons reading the same, that complainant and said *Kerr* were partners and jointly composed the firm of "*E. M. Kerr & Co.*" That various circulars were prepared and issued by *Kerr* and complainant, sometimes by one and sometimes by the other, indicating the same fact, and that in various publications in newspapers in *Baltimore* and elsewhere complainant was held out as a member of said firm, and a partner of *Kerr* and as jointly responsible with him for the debts and liabilities of the firm. That though *Kerr* in his transactions

with third persons, spoke of and held out complainant as his partner, and as a member of said firm, and has thereby, as complainant believes and charges, made him liable for all debts created in the regular and legitimate business of the firm, yet he has not, in other respects, treated complainant as a partner, and has failed and refused to account to him of his one-fourth of the net profits, and to take an account of stock in trade in each year as he was bound to do under his said contract, and has retained exclusive possession and control of the books and effects of the firm. That *Kerr* has failed to meet all the liabilities of the firm as they matured, and in this respect has violated his said contract, and has failed to keep the business well stocked with goods, suitable for carrying on the same. That since the insolvency of *Kerr* on his individual liabilities, he has told complainant that he was jointly liable with himself for all the debts of the firm; whereupon, complainant insisted, that the means of the firm should be applied, in the first instance, to pay its liabilities, and a settlement be made, and complainant paid his share of the profits, which settlement and application, *Kerr* refused to make. That he is advised, and therefore charges, that he is jointly responsible as a partner for all the debts of the firm, exceeding, as he believes, the sum of $20,000, and if he is held personally responsible for them, he is entirely ruined and hopelessly insolvent. That he believes the property and debts of the firm will be nearly, if not quite, sufficient to pay the partnership liabilities. That the business has been extremely profitable, and upon a full and fair adjustment of accounts, complainant will be entitled to a considerable sum over and above his said monthly payments; but that *Kerr* has refused to make such adjustment, or to come to any account in relation thereto. That by reason of the insolvency of said *Kerr*—his improper application of the partnership means to the payment of his individual debts—his refusal to account and to apply the partnership property in payment of the partnership debts, and his holding exclusive possession of the books and effects thereof, complainant is liable for a large amount of partnership debts, without the

means of enforcing an equitable adjustment of the affairs of the firm, except through the interposition of this court. That *Kerr* has refused to apply the partnership property in payment of the partnership liabilities, but without the knowledge and consent of the complainant, has applied a portion thereof in payment of his individual debts: and complainant apprehends and believes he will continue to make such application, unless restrained by this court, and will thereby greatly injure the partnership creditors, whereby the complainant will be totally ruined. That for these reasons he has become very desirous to put an end to said partnership, and has, in fact, applied to *Kerr* to dissolve the same, and all connection in business, and to come to an account in relation thereto, all which he has refused to do.

The bill then prays for the appointment of a receiver, an injunction restraining *Kerr* from selling, disposing of, or retaining from the receiver any of the partnership effects, or collecting any debts due thereto, for a dissolution of said partnership and for general relief.

On the same day, the Chancellor (BLAND) ordered the injunction as prayed, and the application for a receiver to stand over until the coming in of the answer and further order.

Kerr, in his answer filed on the 26th September, 1846, avers that he has been engaged in business in *Baltimore*, carrying on a wholesale and retail "*Queensware and China business*" since the year 1839, under the name, style and firm of "*E. M. Kerr & Co.*" and was so engaged when this bill was filed. That this was the name of a pre-existing firm of which respondent was the active member; but for a considerable period prior to the 23d January, 1845, he had become its sole owner and proprietor, and continued business under that name because it was well known and established, but in many instances, using indifferently his own proper name of "*E. M. Kerr*," and said name of "*E. M. Kerr & Co.*" That on the 23d January, 1845, respondent and complainant entered into an agreement, which is exhibited—the true construction and effect of which he submits to the court, admitting that as far

as the allegations of the bill agree therewith, they are true; but in so far as they differ therefrom, are untrue. But defendant denies that by this agreement, complainant became his partner, or thereby acquired any communion of property with defendant in the stock in trade, or in the rights, or credits, or effects of the firm; and he affirms that the allowance to the complainant of a share of the profits, was only a mode of compensating him for his services as clerk, and in lieu of clerk hire. That even the limited connection between the parties created by this agreement, was dissolved before the filing of the bill, by a notice from complainant to defendant to that effect, as the agreement provided for. He denies that he has ever refused to come to a full and fair settlement with complainant,—but, on the contrary, avers that he has always been willing to account and settle with him. That complainant has in various ways and without authority, received and appropriated to his own use, more of the monies of the defendant, than his portion of the profits entitled him to receive.

The answer then specifies some special instances of such alleged appropriation, and then avers, that upon a fair settlement, the complainant will be found in debt to defendant. That all the goods purchased in the business, the notes made, and the credits given, were made and given in the name of defendant to whom, and to whom alone, the creditors looked for payment, the complainant at the time of the agreement being notoriously and utterly insolvent. He denies that he ever represented or held the complainant out to the public as his partner, or authorized or gave his sanction to any act which could have that effect. He avers that he has always paid his business notes, none having been permitted to lie over until after the service of the injunction, though he admits that he had loaned notes to a considerable amount to a mercantile firm in *Baltimore*, which not being paid at maturity, attachments had issued upon them, and been levied upon certain credits of defendant in *Pennsylvania*, though if these accommodation notes should be paid by the persons to whom they were loaned, he yet hopes to go on prosperously with his business.

The agreement referred to in the answer, and exhibited with it, is as follows:—

"Articles of agreement, made and concluded this twenty-third day of January, in the year of our *Lord* one thousand eight hundred and forty-five, by and between *Edward M. Kerr* and *Moses Potter*, both of the city of *Baltimore*, and State of *Maryland*, *witnesseth*, that whereas the said *E. M. Kerr* has agreed with the said *Moses Potter* to employ him as salesman and general clerk in his store, No. —— *Baltimore* street, in the city of *Baltimore*, and to allow him for the faithful performance of his services in that capacity, one-quarter of the net profits that may arise from the business, after deducting all expenses, and the interest on amount of the capital stock put in said business, at the rate of six *per cent. per annum*, and to pay the said *Moses Potter* from the concern for his support, the sum of eighty-three dollars thirty-three cents per month, which said monthly payments are to be advanced out of the net profits coming to the said *Moses Potter*, and to be deducted from his one-quarter share of the net profits at the end of each year. In consideration of which allowance, the said *Moses Potter* hereby covenants and agrees with the said *E. M. Kerr*, to give his sole and undivided attention to the interest and prosperity of the business, and bring to its aid not only his own labors, but will, as far as in his power lies, enlist the good will and invoke the aid of his friends and acquaintances, both in town and country, in its behalf.

"And the said *E. M. Kerr*, on his part, covenants and agrees with the said *Moses Potter*, that he will to the best of his ability, and with a view to the profits of the said business, purchase and keep the concern well stocked with goods, suitable for the carrying on of the said business. And it is hereby declared to be the meaning of the articles of agreement aforesaid, that thereby the said *Moses Potter* is not made a partner in trade of the said *E. M. Kerr*, but that the allowance of one-fourth of the net profits, after deducting the expenses of the business, and also deducting interest on the amount of the capital, at the rate of six per cent. is as compensation for

the services of the said *Moses Potter*, in lieu of clerk hire. And further, that the said *E. M. Kerr* is to sign all bonds, notes or other obligations, for the payment of money, or for the performance of any contracts or engagements necessary to be entered into, for the conducting of the said business, unless the said *E. M. Kerr* should by special authority in writing, or by power of attorney, put and appoint some one in his place so to do. And also, that the said *E. M. Kerr* shall be at liberty, at any time during the three years aforesaid, to sell out his interest in, or take a partner or partners into the said business, if the selling out or introducing a partner or partners into the said business will not deprive the said *Moses Potter* of his aforesaid share of the net profits, after deductings above mentioned. And the said parties agree that either may withdraw from this agreement, by giving to the other six months notice in writing, of his intention so to do. And it is further understood by and between said parties, that if during the term aforesaid, the said *Moses Potter* should die, and these articles of agreement at the time of his death being then in full operation, and not altered as to notice as aforesaid, in regard to withdrawal, then in such case, an account of sales is to be taken up to the time of his decease, and his proportional part of the profits, after the deductions as aforesaid, are to be paid to the legal representatives of the said *Moses Potter*;—the said account of sales to be made up as speedily after the decease of the said *Moses Potter* as the business season will allow. And it is further agreed that the inventory of the stock in said business, shall be taken each year at the following rates:

In witness whereof, the said parties have hereto signed their names and affixed their seals, on the day and year above written.

Signed and sealed, in the presence of *S. H. Tagart.*" — Edw'd M. Kerr, [*Seal.*] Moses Potter, [*Seal.*]

The following letter from *Potter* to *Kerr*, was also filed with the answer:—

"*Baltimore, February 3d*, 1846.

"*Dear Sir*,—You are hereby notified that I intend to and do hereby withdraw from the agreement of the 23d January, 1845, in relation to the business to be carried on at No. 250 *Baltimore* street, at the expiration of six months from this date. Yours, very respectfully, MOSES POTTER.

To *Edw'd M. Kerr, Esq. Baltimore.*"

Under an agreement for that purpose, a number of depositions and written evidence was taken and filed, to be used at the hearing of the motion to dissolve the injunction made upon the coming in of the answer. This evidence shows that the complainant occupied a position in the business, with the knowledge and consent of both parties, which made him as to third persons, a partner in the concern: and also, that the firm itself, if not actually insolvent, was in circumstances of great embarrassment; and that looking to the defendant's private engagements and responsibilities for other persons, his inability to carry on his business, and eventual insolvency, was almost inevitable.

On the 11th January, 1847, the Chancellor (JOHNSON) ordered the injunction to be continued until the final hearing,—and in his opinion accompanying this order, after stating the allegations of the bill and answer, and the effect of the proof taken, says:—

"The motion to dissolve the injunction has been argued with much ability on both sides, and the duty now rests with the court to decide upon it.

"In support of the motion it has been urged, that as the case now presents itself upon bill, answer and proofs, the plaintiff has no standing in court, because no partnership has been established, either as between the parties themselves, or as to third persons, it being conceded, as the defendant's counsel was understood, that if a partnership existed, the injunction should stand.

"Looking to the agreement of the 23d January, 1845, I should

have little difficulty in saying, that the parties *inter sese*, were not partners. It is true, there was to be a division between them of the net profits, in the proportion of three-fourths to one-fourth, and this stipulation, if unaffected by other provisions in the agreement, would clearly make them partners at least as to third persons; for it is not essential to such a relation, that there should be a participation in losses as well as profits. A contract to share the net profits in any proportion that may be agreed upon, will, to that extent, create a partnership, though the losses are to be borne by one of them exclusively. *Story on Partnership*, 28, *section* 23. *Gow on Partnership*, 15.

"But in this case, the parties whilst they agree to share the net profits of the business, also expressly stipulate that such agreement shall not make them partners, 'but that the allowance of one-fourth of the net profits after deducting the expenses of the business, and the interest upon the capital, shall be considered as a compensation for the services of the said *Moses Potter*, in lieu of clerk hire.'

"It is clear therefore, that whatever may be the effect of this contract upon the rights of third persons, the parties *inter se* cannot be regarded as partners. It is said, however, that even with reference to strangers, these parties are not to be considered as partners, notwithstanding the agreement as to the division of the profits, and the distinction between a stipulation to pay a given sum for services in proportion to a given *quantum* of profits, and a specific interest in the profits themselves *as profits*, is adverted to in support of this proposition. This distinction, it must be confessed, is a subtle and thin one, but it appears to be recognized as established law. *Hamper ex parte*, 17 *Ves.*, 404, 412. *Story on Partnership*, *sec.* 49.

"The agreement, however, in this case is not for a given sum in proportion to the profits, but is for a share of the net profits, as profits. And though it is said in the agreement, that this shall not make the plaintiff a partner, but is to be paid him in lieu of his services as clerk, this stipulation, so far as third persons are concerned, will not prevent his being considered a partner; for as to them, no such stipulation can protect him

from loss. *Hamper ex parte*, 17 *Ves.* 412. *Taylor vs. Terme & Janffret*, 3 *H. & Johns.* 505.

"If, however, the views of the defendant's counsel, in reference to the construction of the agreement, are correct, and the defendant looking to that paper alone, is not to be considered a partner to any extent, there are still circumstances in this case which impose that character upon him. The parties, it seems to me clear beyond dispute, were held out to the public as partners, in all the usual modes in which publicity is given to such associations. If this be so, then the relation existed, as to third persons, whatever may have been the private agreement of the parties themselves, unless with reference to those persons who had knowledge of the particular terms of the agreement. *Story on Partnership*, *sec.* 49.

"A partnership thus clearly existing as to third parties, whatever may have been the relation of the parties *inter sese*, the question presents itself, has the plaintiff under the circumstances of this case, a right to call upon the court for an account, and an injunction to prevent any apprehended misappropriation of the partnership effects, until the account can be taken?

"The dissolution of the partnership does not in my opinion, work any change in the rights of the parties in this respect. Each partner has a right, notwithstanding such dissolution, to insist that the partnership funds, shall be applied in the first place to the payment of the partnership debts. This right is recognized and enforced in equity, as a privilege or lien, and through it, the equity of the joint creditors is secured, to have their debts paid, in preference to the separate creditors of the respective partners. *Ex parte Ruffin*, 6 *Ves.*, 119, 126. *Story on Partnership*, *sections* 97, 326, 327. *Collyer on Partnership*, *B.* 2, *ch.* 1, *sec.* 1.

"This is an equity peculiar to the partners, at least so long as they remain solvent and the partnership is going on, and it is through this equity that the rights of the joint creditors are protected.

"In this case there would seem to be a peculiar propriety, in enforcing the priority which the partnership creditors are en-

titled to, through the privilege or lien which the partners enjoy, to have the funds applied to the satisfaction of the partnership debts. That the concern is insolvent or seriously embarrassed, is undeniable, and it is quite apparent that the defendant owing large sums on his own individual account, claims the right to apply the funds employed in the business to the payment, indiscriminately, of his private and his business engagements, to the manifest prejudice of the joint creditors. And this being so, the rights of those creditors to a priority of payment, will be defeated, unless the court, through the equity or lien of the plaintiff, as a partner, shall interpose for their protection.

"The partnership then being dissolved, and the concern greatly embarrassed, if not actually insolvent, and the defendant being by his own admission, unable to meet his private engagements, his notes not paid at maturity, and the process of attachment having, in some instances, been taken out against him, it would seem to follow, that it is the duty of this court to interpose at the instance of either of the partners, for the protection of the creditors.

"Unless protected in this mode, it may be doubted whether any protection can be afforded them at all, as the lien or equity does not attach to them, but to the partners, through whom the right of priority of the joint creditors is worked out and maintained.

"But independently of this right of the plaintiff as a partner, to insist upon the prior application of the partnership estate to the payment of the partnership debts, there is another ground upon which the bill may be supported. The plaintiff, as appears by the agreement, though not a partner, so far as he and the defendant were concerned, was yet entitled to one-fourth of the net profits of the business; and the connection being terminated and the business broken up, he is entitled to an account of those profits, and perhaps, a lien or preference in respect of them, over the private creditors of the defendant. 3 *Kent Com. 25, note b, 4th ed.*

"It has been argued for the defendant, that the plaintiff has an adequate remedy at law upon this agreement, and there-

fore, his application should not be entertained by this court. But is this so? To ascertain the net profits of the business, the partnership accounts must be taken, which could not be done conveniently, satisfactorily, and fairly by a jury, in the course of a trial at *nisi prius*. That matters of account are subjects over which courts of law and equity have concurrent jurisdiction is established, and it is well settled that the equity tribunals have no jurisdiction where a plain, adequate and complete remedy may be had at law. *Richardson vs. Stillinger*, 12 *G. & J.* 477.

"This then being a bill for an account, and of a character in which the legal remedy, if there be one at all, would be full of difficulty, inadequate and incomplete, the power of this court over the subject would seem to be clear. Being of opinion, that this court has jurisdiction over the subject, the next question which arises is, as to the extent to which the power of this court should be carried, at this stage of the cause.

"The bill prays for an injunction, and the appointment of a receiver, upon the ground chiefly of the right claimed by the defendant, to apply the joint property of the concern to the payment of the claims of his private creditors; and the answer, though it emphatically denies the partnership, does not deny the claim of, or the exercise of this right; nor does it deny, but on the contrary admits, that if these private engagements of the defendant are pressed upon him, being engagements resulting from the loan of his paper to a mercantile firm in *Baltimore*, he will not only be broken up in his business, but rendered insolvent.

"This is a case, therefore, where the partnership, which certainly existed as to third persons, is at an end, the business suspended, and the right claimed and exercised by one of the partners, to apply the funds, which should be applied to the payment of the joint creditors, to the payment, indiscriminately, of them and his individual creditors.

"That a Court of Chancery will, under such circumstances, interpose by injunction, and put a receiver upon the property,

is, I think, established by authority. *Story on Partnership, sections* 227, 228, 229.

"If the view taken by the court is correct, that these parties as to third persons, were partners,—that being partners, the complainant has a right to insist that the partnership effects shall be applied to the satisfaction of the joint creditors; that this right is recognized in equity as a lien, through which the equity of the joint creditors to have their claims first paid, can be enforced, it would seem to be the duty of the court to preserve the property from misappropriation by the partner in possession of the partnership effects, and to place those effects in the hands of a receiver, that the proper application may be made of the property, and the concern wound up. *Gow on Partnership, ch. 2, sec.* 4, 3*d ed.*

"It has been ingeniously urged in the argument of the defendant's solicitor, that the complainant can have no relief upon the ground of his liability to the creditors, or any equity which they may have through him, to have their claims paid in preference to the individual creditors of *Kerr*, because, having planted himself in his bill exclusively upon his title as a partner *inter se*, he must maintain himself upon that ground, and can resort to no other. But the complainant does in his bill, allege his liability as a partner to the creditors of the firm, and that if the application by *Kerr* of the partnership effects to his individual debts is permitted, the partnership creditors will be greatly injured, and he himself utterly ruined. And although the defendant denies that the complainant is a partner, he does not deny the injury to the creditors of the firm, if his individual debts are paid out of its property. It is true, the bill does not allege as a distinct ground of equity, the right of the partnership creditors to seek through the lien of the complainant as a partner, so far as they are concerned, a priority over the private creditors of the defendant; but the facts being stated, upon which this equity of the creditors rests, that equity may be enforced, though not expressly alleged in the bill, as a ground for the action of the court.

"This equity is not a matter *of fact*, which the party must

allege, but a conclusion of law or equity, to be drawn by the court from the statement of facts which give rise to it. *Gibson et al. vs. McCormick*, 10 *G. & J.* 65, 109.

"Having then, after a careful consideration of the circumstances of this case, duly weighing the arguments of the counsel, come to the conclusion, that the plaintiff is entitled to relief in this court, and that justice requires the continuance of the injunction, I shall pass an order to that effect, and incline to the opinion, that a receiver should be appointed, as soon as a proper person is recommended, to the end that the affairs of the partnership may be wound up, and its property and funds collected and distributed, according to the rights of all parties concerned."

An application was then made for the appointment of a receiver; and the Chancellor (JOHNSON) on the 1st February following, passed an order for that purpose, accompanying which he delivered the following opinion:—

"The application for the appointment of a receiver in this case, has been brought before the court by the consent of parties, and their respective solicitors have been fully heard.

"Looking to the nature and extent of the injunction granted by my predecessor on the 8th September, 1846, and continued by my order of the 11th instant, it is difficult to see how the appointment of a receiver can be refused, without material injury to the parties concerned, unless indeed the injunction itself shall be essentially modified.

"It restrains the defendant, *Kerr*, who is in possession of the property and effects of the concern, from selling or disposing of any of the goods and effects of the partnership, or collecting any debts due thereto, or negotiating any bill or note, or contracting any debt whatever on account thereof. In short, it puts a complete stop to the business of the firm, a condition of things, which cannot be continued without great deterioration and loss to all parties having an interest therein.

"If therefore I should conclude not to appoint a receiver to take charge of this property, and make it available to those, to whose benefit it should be applied, I should consider it my

duty, either to dissolve the injunction or so to modify it 'as to avoid these injurious consequences.' The power of the court should never be exercised merely in inflicting injuries, though it sometimes happens in the application of principles designed to advance the general purposes of justice, the interests of individuals are made to suffer.

"The argument upon the present application for a receiver, has, no doubt necessarily involved the question of the propriety of continuing the injunction; a point heretofore adjudged by the court, and I have, from a sense of duty, as well as from inclination, carefully reconsidered the grounds upon which I proceeded in passing that order, with an anxious desire to arrive at just conclusions upon the subject.

"It was my deliberate judgment formed then, and remaining still, that these parties, plaintiff and defendant, as to third persons, must be regarded as partners. Independently of other authorities, in support of this opinion, the case of *Taylor vs. Terme and Janffret*, 3 *Harr. & Johns.* 505, it seems to me is perfectly conclusive.—In that case the defendant *Terme*, was employed by the other defendant *Janffret*, as a clerk and book-keeper, and had no control or management of the business in any other capacity; and yet, because he received a share of the profits, instead of a stipulated salary, he was held liable as a partner, though the plaintiff only knew him as such clerk or book-keeper, and the note upon which suit was brought, was given by *Janffret* alone.

"It was admitted by the very eminent counsel who argued that case for the defendant, that the *English* decisions cited by the plaintiff's counsel, established the position, that where a person derives a benefit from the trade in which another is engaged, by receiving a portion of the profits, he is liable as a partner, although he carefully stipulates, that he is not to be so liable, and the effect of the decisions was attempted to be obviated upon the ground, that being made since the revolution, they were not binding upon the court.

"Being then partners, to the extent of rendering both liable for the engagements of the concern, a dissolution having taken

place, and insolvency impending, if not actually existing, and it being charged and not denied, that the defendant was misapplying the partnership funds, to the payment, indiscriminately, of his individual, as well as the partnership debts, it seemed to me a case was presented, in which it was the duty of the court to interfere. In deciding upon the motion to dissolve the injunction, authorities were cited to show, that each partner upon the dissolution of the partnership, has a perfect right, in the first place, to require that the partnership funds shall be directly and regularly applied to the payment of the partnership debts, and that as between them there is a lien, or at least an equity, which through the partners, may be applied in favor of creditors, though as to the latter it may not attach, by virtue of their original claims, in all cases. *Story on Partnership, sections* 97, 326, 327.

"The evidence clearly shows that the business of this concern is surrounded by serious embarrassments, if not insurmountable difficulties. The affairs of the partnership, under these circumstances, are brought into a Court of Chancery to be there administered, and this court, it is believed, has jurisdiction over the subject, not only as a matter of account between the parties, but upon that principle of equity, by which the partnership creditors, through the plaintiff, the suing partner, have a right to insist, that the partnership funds, shall be applied in the first place, to the payment of their claims, in preference to the individual creditors of the respective partners.

"That the separate creditors can only look to the surplus, after the satisfaction of the joint creditors in a court of equity, has been decided by the Court of Appeals, and, of course, is a position not open for controversy. *McCulloh vs. Dashiell's adr.*, 1 *H. & G.* 96, 106. In the case of *Hazzard vs. Hazzard*, 1 *Story Rep.* 371, cited by the defendant's counsel, the rights of creditors are not at all involved, as they are in this case, not only by the averments of the bill, which show the danger to which they are exposed, by the division of the partnership funds, to the payment of the separate creditors of the defendant, but by the silence of the answer in regard to that allegation,

and its statements in reference to the attachments which those creditors were prosecuting against him. In *Hazzard vs. Hazzard*, the complainant put his right to an account, upon the distinct and sole ground of his being a partner, and Mr. Justice *Story* being of opinion that the parties *inter sese* were not partners, and consequently that the allegations and proofs did not correspond, dismissed the bill.

"In this case, the plaintiff not only asks for an account, as a partner, but he alleges the danger to partnership creditors from the conduct of the defendant, and his own danger and entire ruin, if by reason of the misapplication of the partnership funds by the defendant, those creditors are thrown upon, or have recourse to him, as we have seen they have a clear right to do. This case then, I think, is essentially unlike the case decided by Judge *Story*.

"It has been argued, that the court should at any rate, do no more than restrain the defendant, from applying the joint property (if it be joint) to the payment of his separate debts, and that the joint creditors should be left, from time to time, as the circumstances may render necessary, to apply to the court for the protection of their interests. But would not this course be most inconvenient, and tend to multiply litigation to a very unnecessary extent?

"The joint creditors or plaintiff must be kept constantly on the alert, to prevent a violation of the injunction, which might be done to a great extent, without the risk of detection, and for every attempt of the separate creditors to secure the payment of their claims, to the prejudice of the joint creditors, a bill in equity would have to be filed. It would produce the same inconvenience, which the Lord Chancellor in *ex parte Elton*, 3 *Ves.* 238, deprecated.

"A case has been cited in this argument, which was not referred to, in the argument of the motion to dissolve the injunction, which in its essential features is very much like the case we are considering. It is the case of *ex parte Digby*, and *ex parte Buckston*, *in* 38 *Eng. Com. Law Rep.* 495. The question in that case was, between the assignees under a separate,

and the assignees under a joint *fiat*, and the rights of these assignees depended upon, whether a partnership was shewn to exist, between *Shackleton* and *Blenkin*. The business it appears was carried on in the sole name of *Blenkin*, and that *Shackleton* had been retained by him, as a clerk, or agent, at a salary of £100 a year; but, that afterwards, by a new arrangement between the parties, *Shackleton* was to have a moiety of the profits of the business, as a compensation for his services. There was no agreement in writing, constituting him a partner, nor any entry in the books of the business, from which that circumstance could be implied; and it did not appear, that he brought any capital into the concern, or had any interest in the stock in trade, which was purchased with the separate money of *Blenkin*, and while the alleged partnership was going on, *Shackleton* carried on a separate trade, as a dealer in hops.

"Under these circumstances, the court impounded the separate *fiat*, to give effect to the subsequent joint *fiat*, being of opinion that the arrangement constituted a partnership as to their liabilities, to third persons, and that even if the question was doubtful, a joint commission was never superseded by a separate commission, without sending the disputed fact of partnership to be determined by a jury. And in the case referred to, *Sir G. Roye* said, it appeared to him, the property was joint, and it was the duty of the court, to see how far the rights of all the creditors could be preserved, and that it was the habit of the court in such cases, 'to get the separate *fiat* out of the way of interfering with the joint *fiat*, or impeding the administration of the joint assets, for the general benefit of the joint creditors.' If this then, was a case in bankruptcy, depending in the *English* courts, there can be little or no doubt, that the assets of this firm would be administered under a joint commission, and applied to the payment of the joint creditors, in preference to the separate creditors of *Kerr*. It is said however, that in this case, there is neither the death of either of the parties, bankruptcy, or technical insolvency; and that the rule which gives joint property to the joint creditors, and separate property, to the separate creditors, only applies

to such cases. There is, to be sure, in this case, neither death, bankruptcy, or technical insolvency, but there is actual insolvency, and an intention charged, and not denied on the part of the defendant, to treat the property of this concern as separate property, and to apply it accordingly. This, the Court of Appeals have said, in the case of *McCulloh vs. Dashiell*, 1 *H. & G.* 106, is contrary to the equitable rule, which declares that, the separate creditors can only look to the surplus of the joint fund, after the satisfaction of the joint creditors. Though I have given to this case a very careful consideration, and have had the benefit of able arguments on both sides, it is very possible I may have fallen into error in the conclusion to which my judgment has conducted me; but in that event I have the satisfaction to know, that the legislature of this State, affords the means, by which the party against whom the decision is made, may take that decision to a superior tribunal, where the error, if one has been committed, will be corrected. The act of 1835, chapter 346, and 380, gives the remedy in regard to the injunction, (upon which the order for a receiver depends) but as that remedy has not been pursued, I consider it my duty to appoint a receiver, and shall pass an order for that purpose.

"Though the depositions taken and filed, since the last order have been read, they have not been adverted to in the foregoing observations, nor are they relied upon in support of the order about to be passed, because I am not satisfied, that they were so taken, as to make them evidence. *George M. Gill, Esq.* is recommended as a fit person to be appointed receiver by a large number of creditors, and it is understood there is no objection to him, he will therefore be appointed."

From these several orders, granting and continuing the injunction, and appointing a receiver, the defendant appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Magruder, J.

By Wm. Schley for the appellant.

By Geo. M. Gill and John Nelson for the appellee.

SPENCE, J. delivered the opinion of this court.

The question upon which this case entirely depends, is, whether *Kerr* and *Potter*, stood in the relation to each other of partners *inter se*. If they stood in this relation to each other, the order of the Chancellor granting the injunction, the order continuing the injunction, and the order appointing a receiver were all, and each of them correct, if not, erroneous.

In the examination of this question, all that class of cases in which courts of equity have adjudged the parties to be partners in relation to third persons, are left out of view. This controversy is one to which the creditors are not parties, but one in which *Potter* claims to be an actual partner of *Kerr*, and entitled to the rights and equities of a partner *inter se*. It can only be upon the hypothesis, that *Potter* is a partner of *Kerr*, and holding with him a community of rights and interests in the capital stock and effects of the concern, which creates his lien from which his equities arise. Otherwise his claim can present no other reason, or ground for the interposition of a court of equity, on the ground of lien, than that of any other creditor of *Kerr*.

We will enquire, whether upon the authorities, when applied to the evidence in this cause, *Kerr* and *Potter*, stood in the relation to each other of partners *inter se*. Chancellor *Kent*, in the 3d *vol.* of his *Commentaries*, *page* 32, says "there is a just and marked distinction, between partnerships as respects the public, and partnerships as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership between the parties themselves." At *page* 27, the same author says, "actual intention is requisite to constitute a partnership *inter se*." *See* 1 *Story's Rep.* 371, *Hazzard vs. Hazzard.*

This is not one of those cases so frequently found in the books, where courts, to ascertain the intention of the parties, are obliged to form their conclusions by deductions, drawn by analogy from principles of law applied to the facts and circumstances. The parties themselves in their articles of agreement of the 23d January, 1845, have declared their intention in the

most unequivocal language, as follows: "And it is hereby declared to be the meaning of the articles of agreement aforesaid, that thereby the said *Moses Potter* is not made a partner in trade, of the said *E. M. Kerr*, but that the allowance of one-fourth of the net profits, after deducting the expenses of the business, and also deducting interest on the amount of the capital at the rate of six *per cent.* is a compensation for the services of the said *Moses Potter*, in lieu of clerk hire." We think this declaration and the explanation showing they are not partners *inter se*, in the articles of agreement are conclusive of this question. It was insisted in the argument, that if *Potter* were held liable for the debts of the concern, and not to be treated as a partner *inter se*, and entitled to all the rights and equities as such, would be unfair and fraudulent. The answer to this is, that *Potter* might have known that he was not the actual partner of *Kerr*, and if he performed acts himself, or stood by and saw others perform them, which would render him liable to the creditors of the establishment, the credit given was voluntary, and gave him no other equity than would result to any other individual, who had become responsible for *Kerr's* indebtedness.

But it was insisted, that this liability of *Potter* to the creditors, gave them an equity to come upon the partnership stock and effects, and the case of *ex parte Digby and ex parte Buckston, in* 38 *Eng. Com. Law Rep.* 495, was relied on as maintaining this doctrine. This was a case in bankruptcy, and the controversy was between the assignees under the joint *fiat*, and the assignees under a separate *fiat*. A controversy in fact between the representatives of the joint creditors on the one hand, and the separate creditors on the other. The assignees under the separate *fiat* praying that the joint *fiat* might be annulled, and the assignees under the joint *fiat* that the separate *fiat* might be superseded. Now, as we have before stated, this is not a controversy between creditors, involving the question of joint and separate claims, but is simply one involving the question whether *Potter* was the actual partner of *Kerr*, and had a lien on the stock and effects of the concern.

If this were an application by a creditor charging that *Kerr* and *Potter* were partners in trade, and that he was a creditor of the firm, the dissolution and the insolvency of the firm, and the improper appropriation of the funds of the firm to the payment of the separate creditors, there might be some analogy.

We think, therefore, upon the case as made by the bill, answers, exhibits and proof, there is error in the Chancellor's order awarding the injunction, the order continuing the injunction, and the order appointing a receiver.

In this case we do not decide any question as to the rights of creditors.

The Chancellor's orders are reversed, and the cause remanded, that an account may be stated of the profits, while *Potter* acted as clerk or salesman of *Kerr*.

ORDERS REVERSED AND CAUSE REMANDED.

Dorsey, C. J. dissented.

MARTIN SMITH *vs.* THE STATE OF MARYLAND.—*June*, 1848.

Leasing to another a house, with the intent of its being used as a common bawdy house, is an offence indictable at common law.

There can be no doubt that the keeper of a house of this description may be indicted, and he who leases to another a house, with the intent of its being so used, is *particeps criminis*—an aider and abettor in the misdemeanor.

The indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted; but it need not state when the lease commenced, or was to end.

WRIT OF ERROR to *Baltimore* City Court.

At the October term, 1845, of *Baltimore* City Court, *Martin Smith*, the appellant, was indicted for leasing a house to one *Dorcas Smith* with the knowledge that the said *Dorcas Smith* intended to keep therein a common bawdy house. The indictment is as follows:—

"The jurors, &c. do on their oath, present that *Martin Smith*, late, &c. on the second day September, 1845, with

force and arms, at, &c. unlawfully, willfully, and knowingly, did let a certain house, there situate, of him the said *Martin Smith*, to one *Dorcas Smith*, with an intent that the said *Dorcas Smith* should afterwards, and during the continuance of such lease thereof, then keep and maintain the said house as a common bawdy house; and that afterwards, and during the continuance of such lease thereof, to wit: on the day and year aforesaid, and on divers other days and times, between that day and the day of taking of this inquisition, at the city of *Baltimore* aforesaid, the said *Dorcas Smith* did actually keep and maintain the said house, as a common bawdy house, to the great scandal of all the liege inhabitants of the said State, to the evil example of all others in the like case offending, and against the peace, government, and dignity of the State. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Martin Smith* afterwards, to wit—on the second day of September, in the year of our Lord, 1845, with force and arms, at the City of *Baltimore* aforesaid, unlawfully and knowingly, did let out a certain other house, there situate, which said last mentioned house, he the said *Martin Smith*, then and there had the control of, and the power of letting out, to one *Dorcas Smith*, with intent that the said *Dorcas Smith* should afterwards, and during the continuance of such lease thereof, there keep and maintain the said last mentioned house, as a common bawdy house; and that afterwards, and during the continuance of such lease thereof, to wit, on the day and year aforesaid, and on divers other days and times, between that day and the day of taking this inquisition, at the City of *Baltimore* aforesaid, the said *Dorcas Smith* actually did keep and maintain the said last mentioned house as a common bawdy house, to the great scandal of all the liege citizens of the said State, to the evil example of all others, in the like case offending, and against the peace, government and dignity of the State."

To this indictment, the defendant pleaded not guilty, and the case being submitted to the court, the court (Brice, C. J. Nisbet and Worthington, A. J.,) declared the defendant guilty of the misdemeanor as above charged against him. The

defendant then entered a motion in arrest of judgment and assigned for cause:—

1st. Because the indictment sets forth no crime under the laws of this State.

2d. Because the indictment sets forth no indictable matter.

The court overruled this motion, and imposed a fine of $20 and costs upon the defendant, and who sued out a writ of error to this court.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER and MARTIN, J.

By WALSH for the appellant, who cited 1 *Eva. Har.* 502. 2 *Chitty's C. L.* 5. 13 *Pick.* 169. 17 *Pick.* 83. 2 *S. & R.* 298. 5 *Iredell*, 603, 606. 2 *Hill*, 558, and

By RICHARDSON, *Attorney General*, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

The appellant in this case was convicted, in *Baltimore* City Court, of letting out to *Dorcas Smith*, a house in the City of *Baltimore*, with intent that she should keep and maintain the same as a common bawdy house, and which, afterwards and during the continuance of the lease, was kept as a house of that description.

It appears by the record, that there was a motion in arrest of judgment, and the following reasons were assigned. 1st. Because the indictment sets forth no crime under the laws of the State, and 2d. Because the indictment sets forth no indictable matter. The motion was overruled, and this court is now to decide, whether the court below erred therein.

It may be that none of us can recollect any case like this, which was prosecuted with success in any court of Maryland. But it cannot be inferred, from the mere circumstance, that a particular offence has never been punished, that there is no law to authorize its punishment. A jury may never have been furnished with the requisite proof, or if in some instances the proof was furnished, on which to ground such a prosecution

and yet, no presentment was made, such neglect of duty is no evidence of the non-existence of a law, which made it the duty of the jury, to present it as a misdemeanor. An answer to what was urged on this subject may be found in the Court's opinion, in the case of *The State vs. Buchanan, in* 5 *H. & J.* 317. A learned judge of a sister State, in answer to the argument, that the offence now under consideration, is "intangible by legal punishment," observed, "if any of the attributes of the common law, may be said to stand above the rest in point of excellence, its well known power of pursuing iniquity through all disguises, of stripping from crime the forms under which it seeks to mask itself, and dragging the offender from the dark recesses of fraudulent evasion, has seemed to me to occupy that position."

It cannot be denied, that the keeper of a house of this description, may be indicted at common law, and surely he who leases to another a house, with the intent of its being so used, is *particeps criminis*, an aider and abettor in the misdemeanor. It is true, that in the case of *Brockway vs. The People*, 2 *Hill's N. Y. Reports, page* 550, two judges decided, that for such an act the lessor could not be prosecuted, but with the reasoning of the judge who pronounced the opinion in that case, we are not satisfied. We cannot think that the act of furnishing a house for such an iniquitous purpose, "is more remote, or indirect than the sending of an insulting and provoking message to another, for the express purpose of inducing him to return a challenge." Yet an indictment for sending such a letter has been sustained, *see* 6 *East* 464, and the correctness of that decision in not doubted by the court, in the case of *Brockway.* From that opinion too, one of the judges dissented, and we think his reasoning upon the point most satisfactory, although the precedents with which we have been furnished, would not authorize us to say, that the indictment must charge the owner of the house with being the keeper of it. We have also the decision in the case of *Commonwealth vs. Carrington*, 3 *Pick.* that such an act is a misdemeanor, see also 2 *Wash.* 5, and 5 *Iredell*, 606.

We cannot, therefore, say that the offence charged in this case, is not one which is punishable by indictment.

Other objections to the indictment were taken at the bar, none of which are considered to be fatal. We cannot suppose that it was necessary to state when the lease commenced, or was to end. It would be in vain to prosecute, if in order to support the indictment, this proof, it may be in the possession only of the offending parties, was required. Perhaps the phrase "let out," is not the most appropriate, but its meaning is quite plain.

It cannot be said, that this is a prosecution against *Dorcas Smith*, as well as the appellant. Her name, and what is alleged of her, are introduced of necessity, in stating the offence, for which the appellant is put upon trial. The concluding words are required in every indictment, and refer not to the acts of *Dorcas*, but to those of the appellant, which are charged to be against the peace, government and dignity of the State. Many indictments are to be found in the books, to which the same objection might have been made, and which seem to be sufficient. See for example, indictments for receiving stolen goods knowing them to be stolen.

It does not appear to us that any of the reasons assigned in support of this motion, require us to say, that the offence here charged, is not described with convenient certainty, so as to enable the court to impose the proper fine; or enable the defendant to make his defence, or to plead the indictment in bar to any subsequent proceeding. In the case of *The State vs. Buchanan*, 5 *H. & J.* the court said, "an indictment must contain a certain description of the crime, of which the defendant is accused, and a statement of the facts by which it is constituted." We think the indictment in this case has these requirements, and that without calling in question, some of the principles recognized in that case, we cannot disturb this judgment.

JUDGMENT AFFIRMED.

GEORGE H. STEUART, *Executor of* WILLIAM STEUART, *vs.* JOHN CARR, RICHARD L. STOCKETT AND JOSEPH N. STOCKETT.—*June*, 1848.

A suit in Chancery abated in 1838, by the death of the defendant. The bill of revivor was not filed until 1843, and to account for the delay, it was alleged and proved that the original papers were lost or mislaid in the Chancery office, from July, 1838, to September, 1843; that frequent searches were made for them without effect, by the register and solicitor of the complainants, and that the bill of revivor was filed as soon as they were found. *Held*,

That the plea of limitations, founded upon this lapse of time, would not, under these circumstances, bar the revival of the suit, even if under ordinary circumstances, such a defence would in equity be available.

When an executor fails to give the notice to creditors to exhibit their claims, required by the 13th section of the 8th sub-chapter of the act of 1798, ch. 101, he will not be entitled to the exemption from liability, provided for in the 15th section of the same sub-chapter of the same act.

And if an executor departs from the due course of administration, by paying legacies, after he has acquired knowledge of the claim of a creditor, he will not be exempt from liability for such claim, even though he had previously given the requisite notice to creditors.

Before certain legacies became due and payable under the will, the executor and his co-residuary legatee entered into an agreement in writing, under seal, by which they bound themselves to pay interest on said legacies, semi-annually, from the time they became due until paid; the principal to be paid by the executor in due course of administration. *Held*,

That such a contract cannot impair, destroy or change the rights or priorities of other creditors or legatees, arising under a due course of administration, even if it should be regarded as expressly binding the obligors to pay the legacies therein mentioned.

Whilst an executor acting in the faithful discharge of his duties, will receive the favor and protection of a court of equity, yet if he enters into a covenant, either for his own benefit, or that of him with whom he contracts, by which he binds himself personally for the payment of a debt or legacy, which with the assets then in his hands, and in due course of administration he was not then in a condition to pay, he must take the consequences of his own gratuitous act.

The 2d section of the act of 1823, ch. 131, which places creditors whose claims are known to the executor, but who fail to bring them in, in pursuance of notice given, as required by the act of 1798, upon the same footing with those whose claims are unknown, was never designed to apply to cases where notice to the executor or administrator has been given through the medium of a *lis pendens*, or been in due time followed by it.

In many cases, the authentication of claims in the particular mode required by

the acts of Assembly, is impracticable; the only alternative of the creditor being a resort to a court of justice;—a literal construction, therefore, of the act of 1823 would be fraught with inconsistency and injustice, and will not be placed upon it, if it be susceptible of any other just and rational interpretation.

APPEAL from the Court of Chancery.

The original bill in this case, was filed on the 18th July, 1832, by the appellees against *Geo. H. Steuart*, the appellant's testator and others, alleging the death of one *Richard Watkins*, in the year 1794, seized of a certain tract of land in *Anne Arundel* County, called "*Bessington*," containing one hundred and fifty acres, more or less, leaving a last will and testament whereby he devised said land to his three sons, *Joseph*, *Richard* and *Nicholas*, for life, but made no disposition of the reversion or remainder, after the termination of said life estates, whereby the same descended to the heirs of the testator generally, who were the said three sons, and also three daughters. The bill then states the transfer of the interest of said *Richard*, the son, and of certain other parties, in said land, to the complainant, *Carr*, and the deaths of the other sons and daughters of the testator, leaving numerous children, who are particularly named, many of whom are minors, and their respective interests in the said land stated, and then charges that said *Wm. Steuart* is, and has for a long time been in possession of a part of this land, enjoying the rents and profits thereof, and refusing to account for the same or to give it up to those entitled; that it would be for the benefit of all the parties interested, to have the same sold and the proceeds divided according to their respective rights, and then prays for a sale, and for an account from *Steuart*, for rents and profits of the land held by him.

Exhibit A, is the will of *Richard Watkins*, the elder, and contains, among others, these clauses:—

"*Item.* I give and bequeath unto my son *Joseph Watkins*, all that part or parcel of land called '*Bessington*,' lying over the main road and adjoining the land he bought of *Thomas Stockett.*" "*Item.* I give and bequeath unto my two sons *Nicholas Gassaway Watkins* and *Richard Watkins*, all that

part or parcel of land, called '*Bessington*,' lying on the south east of the main road leading to *South River Church*, to be equally divided between them at the death of my wife."

Other exhibits are also filed with the bill, consisting of deeds and judgments and other evidences of title in the complainants, to which it is not necessary to refer.

The answer of Wm. Steuart, filed on the 17th May, 1834, after admitting the death of *Richard Watkins*, the elder, leaving said will, and the devises to his three sons therein contained, proceeds to state that this defendant is advised to admit, that by virtue of said will the said sons acquired estates for their respective lives in the property thereby devised to them. But insists that at the time of the death of the testator, and from thenceforth until after this defendant had acquired an interest in the lands, it was supposed that said will vested in said sons estates in fee simple in said lands. That many years ago, said *Nicholas Gassaway Watkins* assigned all his interest in said lands to said *Joseph Watkins*, believing he was assigning, and said *Joseph* believing he was purchasing an estate in fee simple, in an undivided moiety of the lands so devised to said *Nicholas* and *Richard;* that after holding said lands in common for some years, they agreed to make partition thereof, between them agreeably to a plat filed with the answer, the said *Joseph* taking for his part the lot containing fifty acres, and said *Richard*, the lot containing seventy-two and a half acres; that after said petition, defendant purchased all the interest of said *Joseph* in all said lands mentioned in his father's will, as by a conveyance from *Solomon Groves*, late sheriff of *Anne Arundel* County, to defendant, filed as part of this answer will appear. Defendant relies on said deed as vesting in him all the right and title of said *Joseph*, as devisee and heir-at-law of his father, and as assignee of said *Nicholas G.* and all other his rights, titles and interest in and to the lands mentioned in and conveyed by said deed. Defendant further states that after he had thus acquired title to, and possession of said lands, he entered into an agreement with said *Richard*, which was consummated, by the execution of two deeds of exchange, filed with the answer whereby

defendant conveyed to said *Richard* the lot of fifty acres, and the latter conveyed to defendant said lot of seventy-two and a half acres, and defendant now and for years past, has been in the possession of the lands so claimed by him. He admits the death of the said *Joseph* and *Nicholas G. Watkins*, and that the bill correctly states the condition of their families, but does not admit that the children or representatives of the said *Nicholas*, have any interest whatever in any part of the said lands, nor that the children of said *Joseph* have any interest in the lands which were devised to him by his father, or in any part of the lands claimed by defendant.

The deed from *Solomon Groves*, the sheriff, to *Wm. Steuart*, the defendant, referred to in the answer and filed with it as Exhibit No. 2, is dated the 23d April, 1818, and recites that writs of *fi. fa.* had been issued upon certain judgments recovered by *Richard Mackubbin* and the *State of Maryland*, against said *Joseph Watkins*, in the years 1800 and 1802, and levied upon a certain tract of land situated in *Anne Arundel* County, called "*Bessington*," the property of said *Watkins*, and that by virtue of writs of *venditioni exponas*, afterwards thereon issued, the said sheriff on the 22d November, 1817, sold the said lands to *Wm. Steuart*, for the sum of $3,010, and then conveys "unto him, the said *Wm. Steuart*, his heirs and assigns, all the right, title and interest of the said *Joseph Watkins*, in and to that part of a tract of land called '*Bessington*,' in which the said *Joseph Watkins* had a *fee simple*, so as aforesaid taken on the writs of *fieri facias*, containing eighty-three and three-quarter acres of land," "also all the right, title and interest of the said *Joseph Watkins*, in and to that part of a tract of land called '*Bessington*,' so as aforesaid taken on the writs of *fieri facias*, which lies on the north side of the main road leading from *South River* Church to *Rawlings' Tavern*," containing thirty-eight and a quarter acres of land, "also all the right, title and interest of the said *Joseph Watkins*, in and to that part of a tract or parcel of land called '*Bessington*,' so as aforesaid taken on the writs of *fieri facias*," "the same being the second lot or parcel of '*Bessington*,' the part alloted to the said *Joseph Watkins*,

agreeably to a division made between the said *Joseph Watkins* and a certain *Richard Watkins* by *Thomas H. Hall* and *John Iglehart, Jr.*, authorized and appointed by the said *Joseph* and *Richard*, to divide that part of the tract or parcel of land called '*Bessington*,' agreeably to the will of their father, beginning at the end of the first line of the first lot allotted to the said *Richard Watkins*, running, &c., containing fifty acres of land more or less."

On the 7th May, 1834, a decree was passed for the sale of the said lands without settling the rights of the parties to their respective shares of the purchase money, with the understanding between the solicitors of the parties that such decree should not prejudice the claim of the complainants against the defendant for an account of rents and profits.

The sale was made and confirmed, and the proceeds brought into court, a mass of testimony was then taken in reference to the sheriff's sale of the estate of *Joseph Watkins*, and the time the land was occupied by *Steuart*, its value, &c., which it is not material to state, and on the 30th April, 1838, the Chancellor (BLAND) passed the following order:

"Ordered, that this case be, and the same is hereby referred to the auditor, with directions to state an account from the pleadings and proofs now in the case, distributing the proceeds of the sale of the real estate among the parties, according to their respective interests. In stating this account, the auditor will assume that under the will of *Richard Watkins*, deceased, his three sons took only a life estate in the land, in the proceedings mentioned, leaving the fee simple thereof, to descend to all his children and heirs equally. That his son, *Joseph Watkins*, being entitled to one specified third of the land for life, and to one undefined sixth part of it by descent, acquired another third for life, and one other sixth part by purchase, which interest of *Joseph's* was sold under a *fieri facias*, and bought by the defendant, *William Steuart*. That the defendant, *John Beard*, by his mortgage and the judicial proceedings thereupon, acquired the life interest of *Richard Watkins*, and nothing more. That the plaintiff, *John Carr*, as assignee of

the purchasers, under the *fieri facias*, against the estate of *Richard Watkins*, is entitled to his interest, not covered by the mortgage to *Beard*, and that *John Carr*, is also entitled as assignee of the other claimants as stated in the bill. The defendant, *William Steuart*, must be held accountable for the rents and profits, according to the actual value of the property, to the other parties, entitled to such portions of it as may have been held by him, from the time when their rights may have respectively accrued up to the day of sale. But there being no evidence of any demand of dower having been made of *William Steuart*, the purchaser, by the widow of *Joseph Watkins*, deceased, she is not entitled to any rents and profits from him."

The auditor then stated an account C, assigning two-thirds of the net proceeds of sale to *William Steuart*, the defendant, which was affirmed by order of the Chancellor on 12th June, 1838.

The auditor afterwards, on the 5th July, 1838, states several accounts of rents and profits, by the last of which (account F,) the defendant, *William Steuart*, is charged with the sum of $954 90, being the annual valuation of two-thirds of the real estate of *Richard Watkins*, deceased, up to the 2d June, 1834, which is awarded to the parties entitled. The defendant on the ninth of the same month, excepted to these accounts of the auditor.

At September term, 1843, the complainants filed a bill of revivor, in which, after stating the above proceedings, up to the exceptions taken to the auditor's account on the 9th July, 1838, they charge that the said papers were mislaid for many years. That before the cause was brought to final hearing, the said *William Steuart* departed this life, leaving a last will and testament, whereof he appointed a certain *George H. Steuart* executor, who has obtained letters testamentary thereon, and has possessed himself of assets of his testator sufficient to answer the demands of your orators, as stated in their original bill. The bill then prays that the suit may be revived, and in case the said executor shall not admit assets of his testator

in his hands, to satisfy the said demands, that an account may be taken under the directions of this court, of the estate and effects of the said testator received by him as executor, &c.

The *answer of* the appellant to this bill of revivor, was filed at March term, 1844, and after admitting the proceedings upon the original bill, as far as the statement of the auditor's accounts, of the 5th July, 1838, and the filing of exceptions thereto by his testator, and other parties, avers that these exceptions were not regularly filed, there being no official endorsement upon the papers, purporting to be such exceptions. Respondent does not admit, (and avers he has no knowledge of the fact,) that the papers in the cause were mislaid for many years, as alleged in the bill, or that they were mislaid for any period of time, and even if such was the fact, he contends it was no fault of his, and he cannot in any manner be held responsible, or be affected by this circumstance, in which he had no agency or privity, and which, for aught that appears to the contrary, may have been caused by the acts or neglect of complainants, or of their agents and solicitors, who had the privilege of withdrawing the papers from the office of the register of this court, and may have done so, and this caused them to have been mislaid. He admits the death of *Wm. Steuart* in October, 1838, leaving a will, and the appointment of respondent as executor. That he has assumed this trust, and in virtue thereof, has possessed himself of assets to a large amount, exceeding the claim of the complainants and other parties to this suit: but he denies that they are entitled to revive, or to maintain this suit against him; for he avers that his testator informed him shortly before his death, that he had made a settlement of the case, and had fully and finally closed the same, by agreeing to take to himself a certain proportion of the proceeds of sale. That such was the impression of respondent, both before and after the death of his testator, and until a short time before the filing of this bill of revivor, when he was informed, greatly to his surprise, that the complainants were still contending and hoping to make testator's estate liable for the rents and profits, so as aforesaid claimed by them.

Respondent states that more than five years have elapsed since the death of the testator and the taking out of letters testamentary by respondent, and that during that time, and before any claim was made on him by complainants, he has paid, or secured to be paid, debts and legacies of his testator to a larger amount than all assets, real and personal, that have come into his hands, liable for debts and legacies; and consequently, complainants have brought forward their claims too late—the entire assets having been exhausted. That he has paid to his co-residuary legatee under the will of said *Steuart*, more than $3,000 for his moiety of the supposed residue after payment of debts and legacies, whereas, there will be no residuum at all. The answer then pleads and relies upon the act of limitations, as a bar to the claim of the complainants; and also the plea of *plene administravit*.

A commission was then issued to take testimony, under which it was proved by the register and solicitors of the parties, that the papers in this case were lost or mislaid early in July, 1838, and were not found until September, 1843, when the bill of revivor was immediately filed. That repeated searches had been made for them by the register, and frequent efforts to find them by the solicitor of the complainants. That when found, the exceptions of complainants and others to the auditor's accounts of rents and profits, were found among them, with the agreement to submit the cause to the Chancellor on the part of the complainants; but none of these papers were marked "filed," by reason of their loss.

On the part of the defendant, the will of his testator, the inventory of the estate, and his various administration accounts passed by the Orphans court, were exhibited and filed, and also the following agreement under seal:—

"The last will and testament of *William Steuart*, late deceased, of *Anne Arundel* County, having devised to his executor, *George H. Steuart*, certain property in trust for payment of debts and legacies, (a considerable part of which property remains unsold, and no more of which is yet sold than will be required to pay debts,) and the two years allowed the exe-

cutor for making said sales, not expiring until about the 31st of October next. The undersigned, residuary legatees under said will, believing that the fund so devised in trust will be sufficient to pay the debts of testator, and the legacies of $5,000 each, to their three sisters, *Sophia E. Delprat*, *Henrietta Thorndike*, and *Elizabeth Calvert*, and to their nephew, *Henry Latrobe*, and desiring that said legatees should enjoy the benefit designed for them by the testator, do hereby agree and bind themselves, jointly and severally, to pay legal interest on said legacies, commencing on the 31st day of October next, semi-annually; that is to say on the 1st of May and 1st of November, in each and every year, until said legacies shall be paid off; the principal of said legacies to be paid by the executor, in due course of administration, out of the funds coming into his hands, whereon said legacies are chargeable; the said *Sophia*, *Henrietta* and *Elizabeth* to be successively paid out of the monies first received by the executor, in the order they may agree upon; or if they fail to point out the order in which said legacies are to be paid, then the executor to pay them off equally, share and share alike, (reserving *Henry Latrobe* for the last,) and whenever partial payments are made on account of either of said legacies, a proportional deduction to be made from the semi-annual payment of interest herein provided for. It is to be understood, however, and it is hereby distinctly averred by the undersigned, that nothing herein contained is to commit them to the payment of interest or principal of any other legacies than those above-mentioned, it being at this time uncertain whether the legacy fund will be sufficient to cover legacies which are made payable after those above-mentioned. Witness our hands and seals this 11th day of June, 1840.

G. H. Steuart, [*Seal.*]
R. S. Steuart, [*Seal.*]

Witness, *James Steuart.*"

The last administration account of the executor, passed on the 19th April, 1844, and also filed under the commission, shows the payment, by the defendant, of three of these legacies

of $5,000 each, on the 22d February, 1844, after the filing of the bill of revivor and return of the subpœna issued thereon.

On the 25th day of July, 1846, the Chancellor (BLAND) "ordered and decreed that the said account F, as stated by the auditor and returned as part of his report, filed on the 6th July, 1838, be and the same is hereby ratified and confirmed, all exceptions to the same at variance to this decree, being hereby overruled," "and it is further adjudged, ordered and decreed, that the defendant, *George H. Steuart*, executor of *William Steuart*, deceased, pay, or bring into this court to be paid unto the said heirs of *Richard Watkins*, deceased, the said sums of money so by the said account F respectively awarded to each of them, amounting altogether to the sum of $954 90, lawful money, with interest on $717 79, part thereof, from the 2d day of June, 1834, until paid or brought in, together with costs, &c."

From this decree, the defendant appealed to this court.

The cause was argued before DORSEY, C. J., MARTIN and FRICK, J.

By GEORGE H. STEWART for the appellant, and

By RANDALL for the appellees.

DORSEY, C. J., delivered the opinion of this court.

To the bill of revivor filed in this case, the appellant hath set up in his answer, three distinct defences. The first is, that he "avers that his said testator informed him within a short time before his death, that he had made a settlement of the above-mentioned case, and had fully and finally closed the same, by agreeing to take to himself a certain proportion of the proceeds of sale." As this statement of a settlement is not responsive to any of the allegations contained in the bill of revivor, and is utterly irreconcilable to the whole tenor of the proceedings in the Court of Chancery, in the life-time of the appellant's testator, we are at a loss to discover how such a communication made by the testator to the appellant, could in

any case, much less in this, interpose the slightest obstacle to the relief sought against the appellant.

The second defence relied on in the appellant's answer, is the plea of limitations, grounded on the lapse of time intervening between the abatement of the suit by the testator's death, and the filing of the bill of revivor. Without inquiring whether, under any ordinary circumstances, such a lapse of time would present an absolute bar to the revival of the suit, or recovery of the claim of the appellees; we are of opinion, that the statements in the bill of revivor, in relation to the loss of the original papers in Chancery, sufficiently account for the delay attending the filing of the bill, and that to deny to the appellees, under the circumstances of this case, their right of reviving their suit, and recovering their claim on the ground of the lapse of time complained of, would be unjust and inequitable, and therefore should not be sanctioned by a court of equity, even conceding such a defence were there otherwise available.

The third defence is *plene administravit*, by the executor, the appellant. In support of this plea, the appellant hath produced a variety of testimony, and all his administration accounts settled with the Orphans court, by which his letters testamentary were granted. If the executor had done all that the law requires, as a protection to him in the payment of debts and legacies; and the payments for which allowances have been made to him by the Orphans court, had been made in the due and regular administration of the assets of his testator, and without the appellees having communicated to him their claim in the mode prescribed by law, he might, with some degree of confidence, have relied on his plea of *plene administravit*. But unfortunately for him, he stands in no such attitude. It no where appears in the record before us, that he gave the notice to creditors to exhibit their claims, as required of him by the *13th sec. of the 8th sub-chapter of the act of* 1798, *ch.* 101,—and consequently, is entitled to none of the protection otherwise extended to him by the *15th sec. of the same sub-chapter* of the same *act of Assembly*. But suppose it were conceded that the executor

had given to the creditors of the testator the requisite notice to exhibit their claims, is he then entitled to the exemption from liability for the claim of the appellees, of which he seeks to avail himself by his plea of *plene administravit?* We think not. The executor has not, in the due course of his administration, made all the payments to legatees, for which he has been allowed by the Orphans court, before he acquired a knowledge of the claim of the appellees. But, on the contrary, several of such payments, far exceeding in amount the subject of the present controversy, were made by him after the subpœna issued on the filing of the bill of revivor, had been served upon him: and it is apparent upon the face of the last of the appellant's accounts passed by the Orphans court, that such payments were made by the appellant out of assets which came to his hands, after service of process to compel his appearance to the bill of revivor, filed against him by the appellees.

But it is insisted, that these payments of the four legacies of $5,000 each, must, notwithstanding, have priority over the claim now before us, because the appellant and his co-residuary legatee, more than four months before those legacies were payable, under the testator's will, by an instrument of writing, under their hands and seals, had bound themselves for the payment, semi-annually, of interest on the legacies, from the time they became due until paid; "the principal of said legacies to be paid by the executor, in due course of administration, out of the funds coming into his hands, whereon said legacies are chargeable." That these co-residuary devisees lost nothing by such an agreement, is manifest; because, in the absence of any such agreement, interest on the legacies from the time they became payable, must have been paid out of the residuum of the testator's estate bequeathed to his two residuary devisees. That said residuum was of value, is apparent from the executor's last account, in which he obtains a credit for $3,000, as paid in full for his brother, *Richard S. Steuart's* share of the residue of the testator's estate, meaning of necessity, after payment of all debts and legacies. That this agreement was entered into

by the residuary legatees for their own benefit, nobody can doubt who reads the record now before us.

What possible influence this agreement can have upon this case, we are unable to comprehend. It is not intimated that any conflict has arisen or can arise between the appellees, who prefer the present claim and the residuary legatees for interest paid by them under the agreement.

For the payment of the four legacies in question, the only responsibility assumed under the agreement by the executor and his co-residuary legatee, was that "the principal of said legacies to be paid by the executor in due course of administration, out of the funds coming into his hands, whereon said legacies are chargeable." Against this stipulation, the appellees have sought nothing; they are perfectly content that the assets in the hands of the executor, should have been applied accordingly. Of the claim of the appellees, the executor was fully notified before the payment of those legacies, and before his receipt of the assets, wherewith the legacies were paid. What then was the executor's duty? What "the due course of administration" of the funds thus coming to his hands? Certainly, to pay the debts first, and then apply the balance in his hands to the payment of legacies. But this, the natural order of things, the appellant seeks to pervert, and to give to legatees that priority of payment always heretofore conceded to creditors. For such an innovation, no authority has been attempted to be referred to, and it is believed that none can be found. In determining on the validity of the plea of *plene administravit*, the existence of the creditor's debt is admitted.

But suppose we are wrong, (which appears to us impossible,) in the construction we have given to this agreement, and that in express terms, it personally bound the appellant and his co-obligor for the payment of the aforesaid legacies, it would not, in the slightest degree, change the opinion we have expressed. Whilst an executor, acting in the faithful discharge of his duties, and in the due course of administration of the assets of the deceased, will have extended to him every favor and protection

which it is in the power of a Court of Chancery consistent with equity and justice to confer; yet, when an executor, departing from the line of his duty, enters into a contract by which, whether for his own benefit, or the benefit of him with whom he contracts, it matters not which, he binds himself personally for the payment of a debt or legacy, which with the assets then in his hands, and in a due course of administration, he was not then in a condition to pay, he must take the consequences of his own gratuitous act, and abide the result: all he can ask or expect at the hands of a court of equity, is that he may be permitted to assert the rights of the creditor or legatee with whom he contracted, in the same manner as if such contract had never been entered into. To impair, destroy, or change the rights or priorities of other creditors or legatees, arising under a due course of administration of the assets of the testator, such a contract cannot have the slightest operation, or with the consequences imputed to it, be countenanced for a moment by a court, either of law or equity. The unjust and fraudulent consequences that would probably result from the toleration of such a power in the hands of an executor, are so obvious to the mind of every lawyer, that to give examples or illustrations of the manner in which they might be produced, would be a useless waste of time.

As another and independent bar to the appellee's right to recover, the appellant relies upon the 2d section of the act of 1823, ch. 131, by which it is enacted, "that in all cases where a claim or claims against a deceased person's estate, shall be known to the executor or administrator of such estate, and such claimant or claimants shall delay, neglect or refuse to bring in his, her or their claim or claims legally authenticated, after notice given as directed in the thirteenth section of the eighth chapter of the act to which this is an additional supplement, and within the time limited in such notice, such claimant or claimants shall be in the same situation to all intents and purposes with regard to his, her or their claims, as those whose claims are unknown to the executor or administrator, any thing

contained in the original act, to which this is an additional supplement, to the contrary notwithstanding."

The only answer that need be given to this new ground of defence, is that this section of the act of Assembly, never was designed to apply, and by the judicial tribunals of the State never has been held as applying to cases where the notice to the executor or administrator has been given through the medium of a *lis pendens* or been in due time followed by it. Numerous cases must arise and have arisen where the authentication of claims in the particular mode prescribed by the acts of Assembly was impracticable, and for the recovery of which, resort to a court of justice was the only alternative left to the creditor for the recovery of his claim. If the act of 1823, is to receive the literal construction now contended for, it would be in the power of the executor or administrator, on almost every estate to prevent any judgment or decree being rendered against them, by making a final distribution of the estate pending the litigation. And a creditor might be, in like manner, defeated, if pending a suit in Chancery against the executor or administrator in whose exclusive knowledge rested the existence and justice of the claim, a final distribution of the deceased estate were made, although at the time of the distribution, the executor or administrator well knew that nothing was wanting but the filing his own answer in Chancery, (which in a few days he must be compelled to file,) conclusively to establish the creditor's claim. A construction fraught with such inconsistency and injustice is never to be imposed upon an act of the legislature, if it be susceptible of any other just and rational interpretation.

The decree of the Chancellor appealed from in this case, is hereby affirmed with costs; and the cause is remanded to the Court of Chancery, that such further proceedings may be had in relation thereto, as shall be necessary to secure to the said appellees the full benefit of the said decree and the affirmance thereof by this court.

DECREE AFFIRMED AND CAUSE REMANDED.

JANE REBECCA GRIFFITH, JAMES S. KEYS AND RUTH HIS WIFE *et al. vs.* PETER REIGART AND WIFE.—*June*, 1848.

A decree of the Court of Chancery upon a creditor's bill, finally and conclusively establishes the claim of the complainant creditor, and the insufficiency of the personal estate to pay the same, and prevents the running of limitations against the claim, as a simple contract debt.

The case of *Belt, Wright & Carroll vs. Diggs and others*, decided at June term, 1836, is not in conflict with the decision in this case.

APPEAL from the equity side of *Baltimore* County Court.

On the 29th March, 1839, a bill was filed on the equity side of said court, by *Margaret Hermange* and *Mary H. Hannon*, for the sale of certain real estate lying in the city of *Baltimore*, which had been mortgaged to the complainants by one *George Riston*, and afterwards conveyed by said *Riston* to *Henry B. Griffith*, who had deceased prior to the filing of the bill, and whose widow and heirs were made defendants. The proceedings in the case prior to the decree are immaterial to the questions involved in this appeal. The decree for a sale of the mortgaged premises was passed on the 4th September, 1839. The property was sold on the 30th April, 1840, and on the 2d October, of the same year, the auditor stated his first account by which a large surplus of the proceeds, after satisfaction of the mortgage debts, was assigned to the widow and heirs of said *Griffith*. This account was not ratified, but ordered to stand for hearing, and on the 5th November, of the same year, the auditor stated a second account correcting an error in the interest allowed to the complainant, *Margaret Hermange*. The widow of *Griffith* then filed her petition, claiming her proportion of the proceeds of sale in lieu of her dower, and the administrators of said *Griffith* filed their claim for the refunding of over-payments made by them as administrators. No notice was given to creditors to file their claims, and no further auditor's account stated until the 15th April, 1845.

On the 2d April, 1845, the appellees, *Peter Reigart* and *Catharine*, (formerly *Catharine Diffenderfer)* his wife, filed in

the cause their petition, in which they allege that said *Griffith* in his life time was indebted to the petitioner, *Catharine*, in the sum of $2,000, with interest, on his promissory note to her for that sum. That in the year 1841, after the death of said *Griffith*, his personal estate being insufficient for the payment of his debts, the said *Catharine* filed her bill in the Court of Chancery against the widow and heirs-at-law of the said *Griffith*, for the sale of certain real estate of the deceased, situated in *Montgomery* County, for the payment of her said claim. That on the 18th May, 1841, a decree was passed for the sale of said real estate, which was accordingly sold, but the proceeds were insufficient to pay said claim, leaving a balance of $948 76, with interest from the 18th June, 1842, still remaining due, as will appear by the auditor's second report and account, dated the 4th January, 1843, and ratified by the Chancellor, on the 6th of the same month. The petition then charges that the surplus in the hands of the trustees in this case, which has been assigned by the auditor to the heirs of said *Griffith*, is applicable to the payment of the claim of the petitioners, and prays that an order to that effect may be passed.

To this claim set up in this petition, the widow and heirs of *Henry B. Griffith*, pleaded the statute of limitations.

On the 15th April, 1845, the auditor filed a third report, in which he states that the claim of *Reigart and wife* had been filed, but as the plea of limitations had been filed thereto, it had not been stated. On the same day the court again referred the case to the auditor with directions to state a new account in which the sum of $1,050, is to be reserved to answer the claim of *Reigart and wife*, and granted leave to the petitioners to take testimony before the auditor in support of their claim. Under this leave, the record of the proceedings on the bill filed in Chancery in 1841, by the appellee, *Catharine*, referred to in the petition, was then filed in the cause. By this record it appears that the bill in that case, was filed on the 20th January, 1841, by *Catharine Diffenderfer*, alleging that said *Henry B. Griffith*, was, in his life time, indebted unto the complainant in

the sum of $2,000, on a certain promissory note for that amount made by the said *Griffith*, by the name of "*H. B. Griffith & Co.*" and a certain *William Street*, as his surety, dated the 31st December, 1831, and payable to the order of complainant three months after date, as will appear by the note which is exhibited with the bill. The bill then particularly describes certain real estate, situated in *Montgomery* County, of which said *Griffith*, died seized and possessed, and after averring the insufficiency of his personal estate for payment of his debts, prays that the said real estate may be sold for the payment of the claim of complainant. The defendants to this bill were the widow and heirs-at-law of said *H. B. Griffith*, the same who were parties to the proceedings in *Baltimore* County Court. Two of the heirs who were infants answered by guardian, the other defendants by counsel, admitting the facts stated in the bill, and submitting to such decree as the court might deem proper. Proof was then taken establishing the claim of the complainant, the insufficiency of the personal assets, and the relationship of the defendants. And on the 18th May, 1841, the Chancellor passed a decree "that the real estate in the proceedings mentioned, whereof *Henry B. Griffith* died seized, shall be sold for the payment of his debts," &c. The sales were then made and finally ratified in April and October, 1842. The auditor then filed two accounts, the second of which was ratified on the 6th January, 1843, and showed the balance before stated, of the claim of the complainant to be still due and unpaid.

Upon this proof, the auditor of *Baltimore* County Court filed his fourth report and account, on the 26th April, 1845, allowing the claim of the appellees, which by agreement, was, if recoverable, stated to amount to $1,126 06.

To this account the appellants filed exceptions. 1st. On the ground that it was barred by limitations. 2d. That the personal estate of *Griffith* was not yet collected and exhausted. These exceptions the court (LE GRAND, A. J.,) overruled and ordered the claim of *Reigart and wife* as stated in said account

to be allowed, and the said account to be finally ratified and confirmed. From this decree the present appeal was taken.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN and FRICK, J.

GLENN and MCMAHON, for the appellants, insisted:—

1st. That the statute of limitations running against the claim until the filing of the petition in April, 1845, was a clear bar to it, unless there be something in the proceedings on the bill filed by *Mrs. Reigart*, in 1841, changing the nature of the original claim or removing the bar of the statute.

2d. That there is nothing in the proceedings in said chancery cause, changing the original nature of the claim of *Mrs. Reigart*, against said *Griffith*, as a simple contract debt.

3d. That the answers in that case, filed in *April*, 1841, are insufficient to take the claim out of the statute, and were never of any avail for that purpose, as it regards the answers put in by guardian for the infant defendants.

4th. That there was no sufficient proof of the exhaustion of the personal estate.

By DAVID STEWART and WM. GEORGE BAKER for the appellees.

As to the first objection, that the claim is barred *by limitations*, the appellees contend that limitations do not bar, for the claim is not founded on the *note* of *Henry B. Griffith*, but on the *decree* of the Court of Chancery, a court of competent jurisdiction, made between proper parties, the same who are parties to the cause in *Baltimore* County Court, the widow and heirs of the deceased. It is not contended, that the decree in Chancery establishes any *personal* claim against the heirs and widow of the deceased, but that it establishes, finally and conclusively, a claim against *all the real estate of which the deceased* died seized, and the *proceeds of all such real estate.*

That the decree in a creditor's bill *establishes the claim* of the complainant in the cause, finally and conclusively, is settled

beyond controversy. *Strike's case*, 1 *Bland*, 68. *Strike vs. McDonald & Son*, 2 *H. & G.* 261. *Williamson vs. Wilson*, 1 *Bland*, 441. *Hammond vs. Hammond*, 2 *Bland*, 359. *Simmons vs. Tongue*, 3 *Bland*, 353.

As to the second objection, not only does the decree establish the claim, but it establishes that the personal assets are insufficient for the payment of the debt. See same cases above cited, and *McKubin vs. Brown*, 1 *Bland*, 415. The ground of these decisions is, that in order to obtain a decree for the sale of the real estate, both the *claim*, and the *insufficiency* of the *personal estate to pay it*, must first be proved. When a decree is passed, it shows that the claim has been proved, and that the insufficiency of the personal estate has been proved.

Besides, it is admitted in this cause, not only that the personal estate is insufficient, but that it has been more than exhausted; the administrators having been in the auditor's *fourth* account, allowed by agreement, $2,000, for over-payments made by them as administrators.

But it has been contended by the appellant's solicitors, that the decree in Chancery only establishes the claim in that particular case; that it does not change the original nature of *Mrs. Reigart's* claim, as a simple contract debt, with reference to the case in *Baltimore* County Court.

The general rule of evidence, in regard as well to decrees in equity as judgments at law, is, that they are binding on all *parties* and *privies*, as well in other cases in which they are adduced in evidence, as in the cases themselves in which such judgments or decrees are passed. Decrees in equity are binding on all who are parties to the cause, and all claiming under them, or represented by them. *Story's Eq. Pleading*, 608. 1 *Stark. Ev.* 253. *Manigault vs. Dreas*, 1 *Baily's Eq. Rep.* (*S. C.*) 293. And there is nothing in this case to take it out of the operation of the general rule. The decree in question established two facts:—1st. The complainant had a just and valid claim against the deceased, *Henry B. Griffith*. 2d. That his personal assets were insufficient for the payment of the

debt so established. Against whom were those facts established? Against the widow, the heirs and administrators of the deceased debtor, the parties defendant, and inasmuch as it was a creditor's bill, and the creditors were required to come in and prove their claims, against the creditors of the deceased also. By the establishment of these two facts, *all the real estate* of which the debtor *died seized*, became liable for the payment of the debt so established. The *remedy* applied by the Court of Chancery, was a decree for the sale of the *Montgomery* County lands, which were all the real estate of the deceased debtor, except that in *Baltimore* city, which had been previously sold by order of *Baltimore* County Court, but the *remedy* thus applied, did not *limit* the binding operation of the facts so established, as against the widow and heirs, *merely* to the lands in *Montgomery* County; for the complainant had no *specific lien* against *those lands*, as *distinguished* from *other real estate* of the debtor: her claim *against the real estate* arose not by *contract*, as by mortgage or other specific lien, but was given by act of Assembly, not against any *specific portion*, but against *all and every part* of the real estate; all is made amenable to the satisfaction of her claim.

If the Chancery proceeding be regarded as a proceeding *in rem*, it is submitted that from the character of the bill, being a creditor's bill, it is a proceeding *against all the real estate* of the deceased. The complainant is first bound to exhaust the *Montgomery* County lands; but the proceeds of those lands having been exhausted, the decree still remains operative to establish the debt and insufficiency of personal assets, as against all other real estate of which *Henry B. Griffith* died seized, and the proceeds thereof.

Further, assuming that the debt of the complainant is not made by the decree, so far a *decree debt*, as to constitute the decree, the foundation of a further proceeding against the heirs *as to other real estate* of the deceased, it is submitted, that the application of proceeds of the sale towards the payment of the complainant's claim by the auditor's accounts ratified by the Chancellor, operates to remove the bar of limitations as to the

balances then remaining due for three years from said ratifications, and before the expiration of three years from the ratification of the last auditor's account, the claim was filed in *Baltimore* County Court, the auditor's second account having been ratified 6th January, 1843, and the claim filed before 15th April, 1845.

It will be observed that according to the usual course of the court, the decree in the chancery cause requires *notice* to be given to the creditors of the deceased, that in conformity thereto *notice was* given, and inasmuch as *no creditor* produced a claim except the complainant, it must be presumed that the complainant is the only creditor, and in fact, no exception having been taken on the ground of there being other creditors, none can be taken in this court.

As to the third objection, the costs incurred by the exhibition of the claim are rightfully allowed by the auditor; when the estate is *solvent*, as in this case, even the costs of re-stating the account by the auditor are to be paid by the estate, *Dorsey vs. Hammond*, 1 *Bland*, 468; but here the claim was filed before the auditor's account was stated; and the account was required to be stated, to state the claim of the administrator as agreed on: Besides in this case there is no ground to impute *laches* to the *appellees* in not sooner filing their claim, inasmuch as *notice to creditors* was not given, as in cases where the proceeds of the real estate of a deceased debtor are to be distributed, there ought to have been, according to the course of the court in such cases.

For these reasons it is submitted, that the order of the court below should be affirmed.

Spence, J., delivered the opinion of this court.

On the 29th March, 1839, *Margaret Hermange* and *Mary H. Hannon* filed their bill in *Baltimore* County Court, as a court of equity, for the sale of certain real estate, situated in the city of *Baltimore*, which had been mortgaged by *George Riston* to *Margaret Hermange* and another, and afterwards conveyed by *Riston* to *Henry B. Griffith*, who died prior to the

filing of this bill, and whose widow and heirs were defendants.

On the 4th September, 1839, a decree was passed for the sale of the real estate, which was sold on the 30th April, 1840. The auditor filed his first account on the 2d October, 1840, a second on the 5th November, 1840, and the third on the 15th April, 1845, before which time the claim of the appellees was filed in the cause.

This claim is stated to have arisen as follows:—

Catharine Diffenderfer, one of the appellees, who afterwards intermarried with *Philip Reigart*, the other appellee, was a creditor of *Henry B. Griffith*, deceased, on his note for $2,000. The personal estate of *Henry B. Griffith* being insufficient for the payment of his debts, on the 20th January, 1841, the said *Catharine* filed in the Court of Chancery a creditor's bill, setting forth her claim, and alleging the insufficiency of *Griffith's* personal estate to pay his debts. The widow and heirs of *Griffith*, by their answers, admitted the truth of the charges in the bill.

Under the commission to take testimony, the execution of the note to the said *Catharine*, and the insufficiency of the personal estate of the said *Griffith*, were proved by competent testimony.

On the 18th May, 1841, the Chancellor decreed the sale of the real estate of said *H. B. Griffith*, in *Montgomery* County. By virtue of said decree, the lands were sold by the trustee. On the 25th October, 1842, the auditor's first account was ratified, which established the claim of the appellants, and his second, on the 6th January, 1843. This last account of the auditor shows that a large part of the complainant's claim is unsatisfied. It is to obtain the payment of this unsatisfied balance of this claim out of the surplus of the proceeds, after payment of the mortgage debt, of the real estate sold by the decree of *Baltimore* County Court, this application is made.

The widow and heirs of *H. B. Griffith* pleaded the act of limitations to this claim, and excepted to the auditor's account, which allowed the same. The court overruled the exceptions,

and ratified the auditor's account, and from this order of the court thus ratifying the auditor's account, this appeal is taken.

The decree of the Chancellor of the 18th May, 1841, decided the insufficiency of the personal estate of *Henry B. Griffith* to pay his debts, and the decree for the sale of the real estate for the satisfaction of this debt, is a final decision in favor of the claim of this creditor, on the ground that the decree can only be passed, upon the establishment of the debt. But it is said in support of the plea of limitations, that it is a decree *in rem*, and this is true; but, it at the same time ascertains and decides the indebtedness of the deceased, and the insufficiency of his personal estate to pay the same. If the decree in this case is to be viewed and taken as passed by a court of competent jurisdiction, to adjudge and determine the indebtedness, and the law subjects the real estate of all persons who die indebted, not leaving personal estate sufficient to pay their debts, to be thus applied, what sound objection can be advanced, that an adjudication thus made, should not be deemed and considered at the date of the decree, as a judgment, final and conclusive of the debt, and insufficiency of the personal estate to pay the debt?

It was insisted in the argument, that the decision of this court at June term, 1836, in the case of *Belt, Wright & Carroll vs. Diggs et al.* was in conflict with this view of this question. But upon examination, it will be found that that case is distinguishable from the one now under consideration. The decree in that case was for the sale of specific property, which had been mortgaged for the payment of a specific debt for which the mortgagor was not personally liable, and the legal estate being in the mortgagee, the office of the decree was to do nothing more than by a sale, to divest the equitable interest, to pay the debt for which the mortgaged premises only were answerable. It would not be contended for a moment, that under a decree to foreclose such a mortgage, that the personal liability of the mortgagor, or any other property or estate than that embraced and described in the mortgage and decree, could be affected thereby. Whereas, the decree on a creditor's bill

for the payment of debts is general, "the real estate or so much thereof as is necessary for the payment of the debts." The fund which the petition in this case prays may be applied to the payment of this debt, is the surplus proceeds of real estate, after the payment of the mortgaged debt in the hands of the trustee; and, as we think, the statute of limitations is not a bar, we affirm the order of the court below.

DECREE AFFIRMED.

NATHANIEL WILLIAMS AND JOHN PRENTISS, *Executors and Trustees under the Will of* JAMES MOSHER, *vs.* ELIZA M. MOSHER.—*June*, 1848.

The appellants were appointed executors and trustees under the will of *J. M.* who died on the 27th March, 1845. *Held*, that the commissions of these trustees were subject to the tax of ten *per cent.* in favor of the State, imposed by the act of 1844, ch. 187, though that act did not go into effect until the 2d *June*, 1845.

The auditor allowed the trustees five *per cent.* commission upon certain rents of the trust estate, collected by them in person, and one-half *per cent.* on others, for collecting which, they had previously paid an agent seven and a half *per cent.* and rejected their claim for a solicitor's fee, paid for preparing their answer in this cause. *Held*, that these allowances and this rejection were properly made.

APPEAL from the Court of Chancery.

The appellee filed her bill on the 21st January, 1847, alleging that *James Mosher*, of *Baltimore* city, died in the year 1845, seized and possessed of a large and valuable real and personal estate, having first executed a last will and testament and five codicils thereto. That the appellants, named as executors in the first codicil, had taken out letters testamentary on the estate of the testator, and entered upon the discharge of their duties as executors. That complainant is the widow of *James Mosher, Jr.* deceased, a son of the testator, by whom she had three children, all of whom were alive at the date of the last codicil to the will. That by the

true construction of the will, the surplus income of the testator's estate, after payment of all debts, legacies, annuities and other charges, was to be invested, and no distribution thereof made until the events therein mentioned should happen. But your oratrix is advised and charges, that by the legal effect and operation of the several codicils, and particularly by virtue of the fourth codicil or memorandum, ratified by the last codicil, the said investment of surplus income is rescinded and revoked, and the executors are requested and directed to appropriate a part of said surplus to your oratrix, for the benefit of her children, and out of the residue, if any, to allow $150 for the benefit of the family of *Dr. Williams*, which last provision is subsequently modified by the last codicil in the manner therein mentioned. That upon the whole effect and construction of said will and codicils,—and until the final settlement of the estate, that is until all the annuities shall cease and fall in, there is no other use or purpose to which the annually accruing surplus can be applied, than for the benefit of your oratrix's said children; and she charges that said surplus is equitably designed for the benefit of her said children, and ought to be so decreed as their rights. That if the executors have a discretionary power to determine what part of the same should be appropriated for the benefit of said children, a court of equity will, if necessary, compel them to exercise a sound discretion, by appropriating the whole, or a substantial part thereof, to that purpose.

The bill further charges, that the debts of the testator have been fully paid, and there will hereafter remain an annual surplus in the hands of the executors, of no very large amount, which they are willing to apply to the benefit of the children of the complainant, if any discretion is vested in them, and they shall be protected in so doing by the authority of this court, at least until said annual surplus shall exceed the annuity bequeathed by the *last of said* codicils, for the benefit of the family of *Dr. Williams.* The bill then prays that the executors may account in this court for the personal estate and the income of the real estate of their testator received by

them, and for an order directing said executors to appropriate the surplus income now in hand, or hereafter to arise from said estate, to your oratrix, to be applied by her for the benefit of her children, and for general relief.

Exhibit A, filed with the bill in the will of *James Mosher*, executed on the 13th February, 1840. By this will, the testator first devises to his wife, *Elizabeth Mosher*, in lieu of dower, and of her thirds of his personal estate.—*First*, a negro woman named *Margaret*, who, with her increase, is to be free after the death of his said wife, and to receive thereafter during life, an annuity of Twenty Dollars, to be paid by his executors out of his estate, unless his said wife should express in writing, her disapprobation of said *Margaret's* conduct. *Secondly*, he gives to his said wife during her natural life, his dwelling-house and office, in front thereof, situated on the south side of *Fayette* street, between *Charles* and *St. Paul's* street, in the city of *Baltimore;* the taxes and insurance on the same to be paid out of the income of his other estate and property: and in case said house should be destroyed by fire, then his wife, at her option, was to be furnished with another house, at a rent not exceeding $150, or be paid that sum in quarter-yearly instalments, out of his general estate, for the remainder of her life. *Thirdly*, he gives to his said wife during life, an annuity of $200, over and above the annuity or ground rent of $100 50, secured to her by his marriage contract, which annuity of $200, with the ground rent aforesaid, is to be paid to her in quarter-yearly instalments.

Then, after the bequest of freedom to his negro woman, *Belinda* and her increase, upon certain specified conditions, the will proceeds: "I give and devise unto my friend, *Nathaniel Williams, Esq.* and my nephew, *George R. Mosher*, both of the city of *Baltimore*, the whole of my estate and property, real, personal and mixed, not herein otherwise specifically disposed of, and all debts, rights and claims whatsoever, to which I shall be entitled at the time of my decease, to have and to hold the same, to them and the survivor of them, and the heirs,

executors and administrators of the survivor, *in trust* for the purposes hereinafter expressed."

The will then gives the said trustees the power of leasing or letting out any part of the real estate, for such time and on such conditions as to them shall appear most beneficial, and directs them, in case *Lewis Nickerson*, the grandson of his wife, should be living at the time of his death, "to make, if in their discretion it be necessary, some provision for him, say about Fifty Dollars *per annum*, if the same shall be justified by the condition of my estate, to assist in educating, raising and fitting him for some useful trade;" "the provision for him may be continued so long during his minority, as the said trustees may think proper." He then directs said trustees to pay to his niece, *Isabella Mosher*, so long as she remains unmarried, an annuity of $100, in semi-annual instalments, out of the interest arising on a single bill of her brother, *George R. Mosher*, for $4,500 so long as said debt, or enough of it to raise said annuity, shall remain unpaid, and afterwards out of his general estate.

He then further directs said trustees to pay out of the income of his estate the sum of Twenty-five Dollars, towards educating each of the three younger children (naming them,) of *Charles Nickerson*, the son of his said wife, until they respectively attain the age of fifteen years. He then relinquishes his right, if he acquired any by marriage, to certain property on south *Liberty* street, in said city, and devises the same to *Jane L. Nickerson*, the daughter of his said wife. The trustees are then directed to apply annually the sum of $200, towards the maintenance and support of the family of *William Mosher*, a son of the testator, during his life, no part of which is in any event to be applicable to the payment of any debts contracted, or to be contracted by said *William*. And in the event of the death of his said son, *William*, leaving his present wife surviving him without a child, the trustees are directed to pay her out of his estate, an annual sum of $200, in such instalments as may be convenient, so long as she remains the widow of said *William*; "if in the opinion and judgment of said

trustees, or the survivor of them, the same shall be necessary for her comfort and support, and not otherwise." The will then proceeds: "I will and desire that the clear income of my estate, if any thing remain after the application annually, or otherwise, of the several sums of money hereinbefore charged thereon, shall be invested in such manner as my said trustees, or the survivor of them, shall think proper, and so on from time to time, until a final distribution of my estate be made as hereinafter directed. Upon the decease of my aforesaid son, *William*, I will and desire that a distribution of my estate be made among all my grand-children, to wit: the children of my late son, *James Mosher*, and the children of my aforesaid son, *William*, provided any child he shall have, all my said grand-children to take *per capita*, reserving, however, in the hands of the said trustees for future distribution, if necessary, so much of my estate as will be sufficient to countervail and pay the several annuities or sums of money, hereinbefore provided for the several annuitants or persons hereinbefore named, until the same shall have ceased, when a final distribution shall be made in manner aforesaid, and I hereby authorize and empower the aforesaid trustees and the survivor of them, to make any sale, disposition or deed of conveyance of my estate and property, that may be requisite and proper for making such final distribution, and for otherwise carrying into full effect the provisions of this my will." The said *Nathaniel Williams* and *George R. Mosher* are then appointed executors.

By the *first* codicil to this will executed on the 11th August, 1841, the testator appoints *John Prentiss*, of *Baltimore* County co-executor and devisee in trust with said *Nathaniel Williams*, in place of said *George R. Mosher*, who had recently died, and authorizes said executors to pay annually out of the testator's general estate the sum of $100, to his niece, *Isabella Mosher*, so long as she remains single and unmarried, provided said annuity cannot be raised from the debt owing from her brother mentioned in the will, and also an annuity or yearly sum not exceeding fifty dollars, to *Jane L. Nickerson*, the

daughter of his said wife (in case she should survive her mother and need assistance) so long as she remains single and unmarried, and also to contribute, in their discretion, during the continuance of their trust the annual sum of ten dollars, towards the support of free schools in the city of *Baltimore*.

By a *second* codicil executed on the 30th November, 1841, the testator gives an additional annuity of $200 to his wife during life, and also an additional annuity of $100 to his niece, *Isabella Mosher*, during her single life, and directs that the several annuities mentioned in the will should take effect from the time of his decease.

By a *third* codicil executed on the 13th December, 1841, he revokes the previous disposition made of his servant, *Margaret*, and manumits her absolutely at the expiration of six months from the time of his death, and gives her a legacy of twenty dollars.

The following memorandum was signed by the testator on 3d of June, 1842, in presence of *Neilson Poe*. "It is the desire of *James Mosher*, that if his estate should accumulate beyond the amount required to pay the legacies and bequests in his will, his executors, in their discretion, shall appropriate a part of the surplus to *Mrs. Eliza M. Mosher*, for the benefit of her children until the estate shall be finally settled, and fifty dollars for the benefit of the family of his son *Dr. William Mosher*, and should such an accumulation accrue from the death of his wife, he desires that his executors will appropriate occasionally, according to their best discretion, the amount of $200 *per annum*, for the benefit of the children of *Charles V. Nickerson*, that is, for their support and education, until they shall have been provided for by learning some useful trade or profession, or shall have arrived at the age of seventeen years."

By a *fourth* codicil, duly executed on the 1st May, 1843, the above memorandum was confirmed by the testator and adopted as a part of his will, excepting the sum bequeathed for the benefit of the family of his son *William*, which was revoked, and the sum originally given in the will for that purpose, was

increased to $600, on the same terms and conditions as are prescribed in the will for the original bequest.

The anwers of the executors, filed at the same time with the bill, states that they have paid the debts of the deceased and settled up his estate in the Orphans court. They further state, that as trustees, they are desirous to settle an account before this court, and herewith file a statement of all their receipts and payments, for and on account of the said estate, and are content to make any distribution, in the discretion of this court, of the balance in their hands. They, however, suggest a doubt whether the complainant is entitled to any payment from said estate for the purposes set forth in her bill, until all or a part of the annuitants are deceased, all being at this time living.

The cause was then referred to the auditor, who on the 25th March, 1847, filed his report and account, in which he charged the trustees with the amount admitted to have been received by them, and credited them with commissions at five *per cent.* on the amount collected by themselves, and one-half *per cent.* on the residue, consisting of certain ground rents, for the collection of which they had paid to an agent, a commission of seven and a half *per cent.* the tax of ten *per cent.* being deducted and assigned to the State; with sundry disbursements made by them in the discharge of their duties, &c. leaving a balance in their hands of $470, subject to the order of this court, which the auditor suggests, with the future annual surplus of the estate, should, upon proper proof as to their necessities, be paid over to the complainant for the use and benefit of her children. The allowance claimed by the trustees for a fee paid their solicitor for preparing their answer to the bill was rejected.

To this report the defendants excepted. 1st, Because the auditor awards to the complainant the surplus in the hands of the trustees; whereas, they submit, whether the true construction of the will and codicils of the testator entitles her to such surplus in the present condition of the annuitants who are all in full life, and whether, therefore, these defendants would be justified in paying over the same to her. 2d. To the rejection of a solicitor's fee of fifty dollars actually paid by them for

drawing their answer and making up their account in the case. 3. To the allowance of only five *per cent.* commission on the amount of proceeds actually collected by them, there being for further security two trustees, whereas the business is almost necessarily done by one, and inasmuch as the Orphans court of *Baltimore* County, with a knowledge of the trouble and care required for an exact attention to the estate, allowed for the part of the estate administered before them a commission of eight and a half *per cent.* 4th. Because the auditor only allows one-half of one *per cent.* on certain small ground rents, and which require for their collection, an old experienced collector who does not think himself over paid by seven and a half *per cent.*, and only consents to continue to take the trouble because he was accustomed to do so for the testator, and being specially urged thereto by the trustees. 5th. Because the auditor allows tax on the commissions, on behalf of the State, although the testator died on the 27th March, 1845, immediately after which the duties of these defendants commenced, and the act under which the allowance has been made only began to take effect on the 2d June following.

This report and the exceptions thereto being submitted, the Chancellor (JOHNSON) on the 9th April, 1847, passed the following order:—

"The report of the auditor in this case and the exceptions taken thereto, having been submitted without argument, by an agreement filed on the 7th instant, the proceedings have been since read and considered. It is the opinion of the Chancellor, that the memorandum to the will of the late *James Mosher*, and which is adopted and confirmed as a part thereof by his last codicil, executed on the 1st May, 1843, appropriates in the event which has happened, a part of the surplus of his estate, after paying the previous charges thereon, to *Mrs. Eliza M. Mosher*, the complainant, for the benefit of her children, until the estate shall be finally settled. In order, however, that a sound discretion may be exercised upon the subject, in determining what portion of such surplus shall be so applied, it would seem proper that evidence should be intro-

duced, showing the situation and wants of the children to be benefitted by such appropriation.

"The Chancellor does not think, as stated in the bill, that until the final settlement of the estate, there is no other purpose to which the annual surplus of the estate can be applied; on the contrary, he thinks that the provision in the will of the deceased, that the clear income of his estate, after the payment of the sums charged upon it, shall be invested in such manner as his trustees may think proper, would attach to such surplus, and continue to control its application, until the period for the final distribution shall arrive, according to the direction of the will. The distribution of the surplus appearing to be in the hands of the trustees, will therefore be reserved, until some proof shall be offered in regard to the conditions and necessities of the children of the complainant. The other exceptions on the part of the defendants, are not in the opinion of the Chancellor well taken, and will be overruled. It is thereupon ordered this 9th April, 1847, that the report of the auditor of the 17th March, 1847, so far as relates to the charges against and the allowances made to the trustees, be, and the same is hereby ratified and confirmed; and it is further ordered, that the application of the surplus in the hands of the trustees be suspended, until further order, and that the parties have leave to take depositions in reference thereto, before a justice of the peace, upon giving three days notice to the opposite parties, or their solicitor; provided, that the depositions so to be taken, be filed in the Chancery office, on or before the 20th May next. All exceptions at variance with this order, are overruled and rejected."

From this order, the defendants appealed, and at the same time, stated the following grounds upon which their appeal was taken:—

It is the desire and intention of the defendants to appeal to the Court of Appeals from the Chancellor's decree, in overruling the exceptions taken by them to the report of the auditor, in the following particulars:—

First, wherein the auditor disallowed the fee of Fifty Dollars paid to their solicitor.

Second, wherein the auditor only allowed the defendants five *per cent.* commissions.

Third, whereas the auditor only allowed the defendants one-half of one *per cent.* on the amount collected by them through a collector.

Fourth, wherein the auditor makes a deduction of ten *per cent.* from the defendant's commissions, on behalf of the State.

The defendants decline to appeal from the decision of the Chancellor, in favor of the complainant.

The cause was submitted without argument to the court—DORSEY, C. J., SPENCE, MARTIN and MAGRUDER, J.

By N. WILLIAMS for the appellants, and

By R. J. BRENT for the appellee.

By the court: ORDER AFFIRMED.

WILLIAM G. ROBEY *vs.* WALTER W. HANNON AND HENRY W. HANNON.—*December*, 1845.

The will of *W. H.* executed on the 16th May, 1838, was admitted to probate on the 18th September of the same year. The appellees, the executors of this will, afterwards, on the 20th November following, offered for probate a deed, duly executed and recorded, dated the 8th September, 1832, by which their testator conveyed to the appellees, his two sons, "one-half of all the personal estate of which he might die possessed." In June, 1839, after process of citation to all parties interested, the Orphans court admitted this deed to record, as a testamentary paper. On the 20th May, 1845, the appellant and his then wife, one of the heirs and devisees of the testator, filed in said Orphans court a petition, praying for certain reasons therein stated, that the probate of said deed might be revoked and vacated. Upon appeal from the order of said court dismissing this petition, it was *Held*, that this deed was not a testamentary paper, and the order of the Orphans court directing it to be recorded as such, was null and void.

APPEALS from the *Orphans Court* of *Charles* County.

On the 18th September, 1838, the appellees, as executors of the last will and testament of *Walter W. Hannon*, offered to the Orphans court of *Charles* County for probate, the will of their testator, dated the 16th May, 1838, whereby, after payment of debts and funeral charges, &c., the testator devises as follows: "*Item*—I give and bequeath to my daughter, *Grace Ann Robey*, wife of *William Gerard Robey*, my dwelling plantation, whereon I now live, called '*Moore's Rest*,' containing two hundred acres more or less—also all that part or parcel of land called '*Conjunction*,' lying," &c., "but in case my said daughter, *Grace Ann*, should die, without lawful heirs begotten of her body, then it is my will and desire that the said lands shall be the estate and property of my two sons, *Walter W. Hannon*, and *Henry M. Hannon*, equally to them and their heirs forever." "*Item*—I also give and bequeath to my said daughter, *Grace Ann Robey*, one-third part of my personal property I die possessed of, and not otherwise willed or disposed of." "And lastly, I do hereby constitute and appoint my two sons, *Walter W.*, and *Henry M. Hannon* my executors of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament." This will was duly admitted to probate, and letters testamentary granted to the executors, who, afterwards, on the 20th November, 1838, filed their petition in said Orphans court, stating the probate of said will, and further alleging that their father, on the 17th September, 1832, executed a deed of gift to your petitioners of one-half of his personal estate that he might die possessed of, as will appear by said deed filed with the petition, and praying that the same may be admitted to probate as a testamentary paper of said *Walter W. Hannon, Senior*, and order the same to be recorded as such, and that citation may be issued to *William G. Robey*, and *Grace Ann*, his wife, *Julia Hannon*, *Frances O. Hannon*, and the other

heirs of *Walter Hannon* deceased, to show cause why the prayer of this petition should not be granted.

The deed exhibited with this petition is as follows:

"This Indenture, made this 8th day of September, in the year of our Lord one thousand eight hundred and thirty-two, between *Walter W. Hannon, Sen.*, of *Charles* County, in the State of *Maryland*, of the one part, and *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, sons of the said *Walter W. Hannon, Sen.* of the county and State aforesaid, of the other part, witnesseth, that the said *Walter W. Hannon, Sen.*, as well for, and in consideration of the natural love and affection which he, the said *Walter W. Hannon, Sen.* hath, and beareth unto the said *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, as also for the better maintenance, support, livelihood and preferment of them, the said *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, hath given, granted, aliened, enfeoffed, and confirmed, and by these presents doth give, grant, alien, enfeoff, and confirm unto the said *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, their heirs and assigns, one-half of all my personal estate of which I may die possessed, to the only proper use and behoof of them, the said *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, and their heirs and assigns forever. In witness whereof, I have hereunto subscribed my name and affixed my seal the day and year first before written.

W. W. Hannon, [*Seal.*]"

This deed was duly acknowledged and recorded on the 17th September, 1832, among the land records of *Charles* County.

The citation was issued as prayed, upon the return of which was endorsed by the sheriff, "Cited *Julian, Lemuel, Euphenia, Henry W.*" "Not cited the rest." *William G. Robey* appeared on the 27th November, 1838, and prayed for an extension of time. The cause was then continued from time to time, and orders of publication for the absent heirs granted and published, until June term, 1839, when the following docket entry appears in the case. "Testamentary paper ordered to be recorded—case off on payment of costs."

On the 20th May, 1845, *William G. Robey*, the appellant, filed his petition in said Orphans court, stating that he intermarried with *Grace Ann Hannon*, the daughter of the late *W. W. Hannon*, and one of the residuary legatees under his last will and testament, and that his said wife died in June, 1841, leaving children. That the deed of gift, of the 8th September, 1832, had been erroneously admitted to probate, said instrument having been expressly revoked and annulled by the revoking clause in the last will and testament of the said *W. W. Hannon*, executed long afterwards. That at the time the said deed was admitted to probate and record, as a testamentary paper, no evidence was, or had been offered, to show that there was any error in date, as to either the said deed, or the said will, or that the said deed was of posterior execution to the will, or that it was even republished by the testator after the 16th May, 1838, (the date of the will,) and praying that the probate of said deed as a testamentary paper, may be revoked and vacated, and for general relief.

The appellees answered this petition, on the 22d July, 1845, admitting the death of *W. W. Hannon, Sen.*, and the probate of his will. They further state, that the said testator executed the deed referred to, which was exhibited to said Orphans court for probate, at December term, 1838, accompanied with a petition, making the said *William G. Robey*, and *Grace Ann*, his wife, and all the other heirs of *Walter W. Hannon*, deceased, defendants. That citation was issued against them; that said appellant and wife appeared in court, and obtained leave to shew cause, &c. That such proceedings were thereupon had; that said paper was adjudged and decreed to be a testamentary paper, and ordered to be recorded as such. And your respondents deny and controvert the right of this Honorable Court to review, revise and correct said decree, as the same has already been adjudicated upon an adversary proceeding, and if any error was committed, a higher tribunal must correct it. They deny the jurisdiction of this court to examine into the propriety and correctness of said decree; but,

nevertheless, assert that the same was correct, as said deed was not inconsistent with said will, referred to in the petition.

At the hearing of this application of the appellants, it was proved by *Walter Mitchell*, a competent witness, that at the time the paper of September, 1832, was offered and admitted to probate, no testimony was taken to shew an error in the date of any testamentary paper of said *Walter W. Hannon, Sen.* or of the re-publication by him of a testamentary, or any other paper, or any proof at all offered, as to the paper of the 8th September, 1832.

On the 29th August, 1845, the said Orphans court, one of the justices (HAWKINS) dissenting: "Ordered, adjudged and decreed, that the petition of the said *William G. Robey* be dismissed with costs."

From this decree, the present appeal was taken.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER, SPENCE and MARTIN, J.

By WM. H. TUCK and ROBERT J. BRENT for the appellants.

1ST POINT.—That the deed of 8th September, 1832, being inoperative by the revoking clause of the will of May, 1838, was erroneously admitted to probate, especially as the donees, (the appellees,) as executors of the will, had themselves proved the will of May, 1838, as the only last will and testament of their testator.

Assuming the dates of these papers to be correctly stated, and that there was no re-publication of that of the 8th September, 1832, it is manifest, that the will of 1838 was the *only* paper that was entitled to probate as the last will and testament of the deceased; because the last clause expressly revokes all other wills. That instrument had been duly admitted to probate. The executors, (the donees in the paper they now set up as the will,) themselves propounding it, and swearing that it was "the true and whole last will and testament of the deceased that had come to their hands and possession, and that they did not know of any other."

Yet they afterwards come into the Orphans court and propound for probate the paper of 8th September, 1832, setting it up as a testamentary paper. The Orphans court admitted it to probate, whether as the *only* last will and testament, or to be taken and considered with that of May, 1838, on the ground that both constituted the will of the deceased, does not appear. For either purpose, such an order was void, because the will of 1838 revoked *expressly* all former wills; ratified that and none other to be his last will and testament.

Being subsequent in date—revoking all other wills—and no prior will having been republished after the 16th May, 1838, it may be safely said that the instrument of that date was properly admitted to probate, and that the Orphans court erred in admitting the paper of 8th September, 1832.

2D POINT.—That the proceedings upon the application of the appellees of 20th November, 1838, were not plenary, or such as rendered an appeal necessary, and that under the circumstances of the case, and the character of the proceedings, it was competent for the Orphans court to revise said proceedings, and vacate the probate of the paper of September, 1832, on the application of the appellant.

Supposing the paper of September, 1832, to have been improperly admitted to probate as the will of the deceased, is it now too late to have the probate vacated? If it could be shewn that the instrument was a forgery, the power of the court at any time to vacate the probate could not be questioned. And the same principle prevails where fraud has been practised in preventing the first probate. 1 *Wm's Executors*, 359, 371; *Wentw. Executors*, 111, 112, (14*th edition*,) *Allen vs. Dundas*, 3 *Term Rep.* 125, 129.

It will be observed, that the proceedings of the court, on which the appellees rely in answer to the petition of the appellant, do not shew that any proof was taken as to the execution of the paper of September, 1832. It seems to have been considered as the act of *Walter W. Hannon*, merely, because it appeared to have been executed before justices of the peace as a deed, and recorded in the clerk's office. As the appel-

lees rely on these proceedings, and they are exhibited with their answer, it may be assumed, that the record contains all the proceedings of the court at that time; and indeed the testimony of *Walter Mitchell* shews that no proof was taken in any wise relating to that paper.

This then is the case of an instrument of writing—having none of the forms or characteristics of a will, propounded by the only persons in any manner interested in establishing it; not proved, even in common form, to have been the act of the party; none of the circumstances of its execution ascertained by the court; no *caveat* filed; no issues joined, and yet it is contended that this proceeding is to have all the binding and conclusive effect of a decree upon plenary proceedings.

If a will be perfect on its face, it may be proved in common form, by the oath of one or more witnesses, according to circumstances. *See* 1 *Wm's Ex'r*, 190, 191. This paper was not proved even by the executors, who are the appellees, although it was propounded by them. This court have said in the case of *Dorsey vs. Sheppard et al.* 12 *G. & John.* 192, "that the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every particular." The appellant does not contend that the same rule, in all its strictness, should be applied to the present case; but it is respectfully submitted, that a mere testamentary paper should occupy a middle position, so to speak, between a will in form and a will by mere nuncupation, or at any rate, that it should be proved, as to the *factum* at least, by as strong evidence as would be requisite were it in the form of a last will and testament; and where there is a subsequent will, (as in this case,) already admitted to probate on the oath of the very parties setting up the testamentary paper, it is due to justice and to all parties concerned, that some enquiry should be made and proof taken.

This view is sustained by the act of 1798, ch. 101, sub-ch. 2, sec. 12, which provides, that if no objection be made to the probate, or no *caveat* be filed against the same before probate, it shall not be necessary to examine *all* the subscribing witnesses

unless they shall voluntarily attend—but probate may be made on such proof as is required to give efficacy to a will of personalty. (Thus implying that one subscribing witness at least, and all, if they attend, must be examined.) "Provided, (says the act,) that every executor or other person exhibiting a will, shall be examined on oath, whether or not he or she knows of any other will or codicil, and in what manner the will or codicil exhibited came to his or her hands." The court will find that no such examination was made, although there were witnesses to the paper.

It is contended, however, by the appellees in their answer, that the present application comes too late; that we should have appealed from the order admitting the paper to probat in 1839. The act of 1798, ch. 101, sub-ch. 2, sec. 7, provides, that "if a will of personalty be exhibited to the Orphans court for probate, and any of the next relations of deceased shall attend, or if notice shall appear to have been given, (as in the 6th section,) and no *caveat* shall have been made against the said will or codicil, the said court may forthwith proceed to take the probate." The 8th section provides, in case of the relations not appearing, and no notice being given, that "summons may issue, or notice be given by publication;" and if no objection be made, or *caveat* entered on or before a day fixed, the court or register may proceed to take the probate; but if objection shall be made on or before the day appointed, the said court shall have cognizance of the affair, and shall determine according to the testimony on both sides.

These sections of the act prescribe the manner of proving a will; the *seventh*, where no objection is made; the *eighth*, where there is objection. In the last case, (of objections being made,) "the court shall determine, according to the testimony on both sides." The 13th section of the same sub-chapter provides, that "if the probate of any will or codicil be taken as aforesaid *without contest*, any person, before letters are granted, may file a petition to the court, praying that the case be again examined and heard, and therefore, the court shall delay granting letters until a decision be had; and in case

letters shall have been granted, (says the act,) and any person shall file such petition, and the court, on hearing both sides, that is to say, the petitioner and the grantee of such letters, shall decide against the probate, the letters aforesaid shall be revoked, and the power of the party under the said letters shall cease; and the said will shall not be proved in any other county, unless the decision be reversed by the Court of Chancery, or general court." The appellant insists that the paper of September, 1832, was admitted to probate "*without contest.*" The court will find that the petition of the appellees propounding that paper for probate, was not answered by the appellant, or any other person; that no proof was taken to shew an error in date, in either that paper or the will; that the execution of the paper was not even proved, and that the record does not present any of the features of a plenary proceeding mentioned in the 16th and 17th sections of the act of 1798, ch. 101, sub-ch. 15.

If the probat was taken *without contest*, the parties were not obliged to appeal. The 13th section provides a remedy in addition to the right of appeal, by allowing any person to file a petition for a re-hearing; and there is no limit as to time.

It is contended by the appellant, that the same right to have the case re-heard exists now, as if the act of 1818, ch. 204, (relating to appeals from the Orphans courts,) had not passed. That act regulated appeals where the right of appeal existed before. The title shews this—"for the better regulation of appeals," &c. It does not deprive a party of any remedy that he might before have employed in the place of an appeal. Even conceding that the appellant might, under this act, have appealed from the probate of this paper in 1839, yet he was not obliged to appeal, or lose his remedy altogether. This act does not repeal, or in any manner impair the 13th section of sub-ch. 2, 1798, ch. 101, above recited. They exist together. If a party chooses to appeal, he may, by putting his case in a proper form; or he may resort to the remedy provided by the 13th section above mentioned.

But we contend that the present appellant could not have

appealed from the proceedings of 1839, on the application of the appellees to have the paper in question admitted to probat. The 3d section of the act of 1818, ch. 204, provides that in all plenary proceedings, the court shall reduce to writing and sign their decree; and in case of appeal, it shall be transmitted with the other proceedings. It will be seen that the action of the court is entered in the form only of a docket entry.—"Testamentary paper ordered to be recorded—case off on payment of cost." This is not such a decree in writing signed by the court, as the above section requires. It does not appear to be a final decree for probat. Not one word is said about proving the paper, or admitting it to probat; and taken altogether, it would seem that the court designed to reject the probat of the paper, but for some reason which does not appear, they allowed it to be recorded. The last clause of the entry, "off on payment of cost," is equivalent at common law to a *non pros*, and seems to be inconsistent with the idea of granting probat of the paper. If the proceedings of the Orphans court were not in such form as allowed an appeal to be taken, it was not the fault of the parties. The 3d section of the act of 1818, makes it "*the duty of the court* to reduce to writing and sign the order or decree." If it had been regarded by the court as a plenary proceeding, they would have put their decree in the form prescribed by that act. The proceedings not being plenary, but without contest, and not in the form for an appeal prescribed by the act, the appellant claims the benefit of the remedy furnished by the 13th section of sub-ch. 2.

No argument can be drawn from the length of time elapsed since the proceedings of 1839. The 13th section does not limit the parties as to time. They were left, in this respect, as the law stood prior to that act. In the case of *Satterthwaite vs. Satterthwaite*, 3 *Phillimore*, *page* 1, (1 *Eng. Ecl. Rep.* 351,) probate of a testamentary paper was reviewed after the lapse of nine years, and the paper rejected. In *Finucam vs. Gayfere*, 3 *Phillimore*, 405, (1 *Eng. Ecl. Rep.* 425,) probate was granted in 1807, and reviewed and revoked in 1820. In the last case,

the court said that time alone was no absolute bar to the application.

Although inconvenience may sometimes result from a rehearing after so long a time, yet no such consequences can be predicated of the present application, because, if so, the appellees would have taken that defence in the answer. In point of fact, they cannot be damnified, because the parties are now contesting their respective rights under the testamentary dispositions of *Walter W. Hannon*. This the records of this court will shew. In the case of *Hannon vs. Robey*, (not reported,) the court said, that the paper of September, 1832, must, for all the purposes of that case, be taken as properly admitted to probate. (The question then came up incidentally, and the court could not review the question of probate on that record.) And the court, as if to account for what would otherwise have been error in the Orphans court, say that the paper may have been admitted to probate in consequence of there being error in the date of one of the instruments, or the one first executed may have been re-published afterwards. The proceedings shew that there was no such reason for the action of the Orphans court, in allowing probat of the paper.

The instrument having been illegally admitted to record by the Orphans court, it is respectfully submitted that it is not too late to have the proceedings reviewed; and that the intention of the deceased will be gratified, by pronouncing against its being considered as his will, and by giving full force to the will proper of May, 1838.

By Peter W. Crain for the appellees.

The appellees, as the executors of *Walter W. Hannon, Sen.*, exhibited on the 18th September, 1838, to the Orphans court of *Charles* county, a paper purporting to be the last will and testament of *Walter W. Hannon*, and the same was probated according to law. Subsequent to which, and on the 20th day of November, 1838, by the advice of counsel, the testamentary paper, dated the 8th September, was also exhibited by the executors for probate and record, and at the same time filing a

petition against the appellant and all the heirs, devisees and legatees of *Walter W. Hannon*, requiring them to appear in the Orphans court, to shew cause why said paper should not be admitted to record. By the proceedings of the Orphans court, it will appear that *William G. Robey*, the present appellant, appeared in person to the citation, and the case, at his instance, continued from December, 1838, to June term, 1839, when the paper was admitted to record as prayed. No appeal was taken from this decree, and no evidence reduced to writing; but, on the contrary, the appellant acquiesced in said decree until the 20th May, 1845, and then filed his petition to the Orphans court to review and revise a decree of a preceding Orphans court, and which had been acquiesced in by the petitioner and present appellant for nearly six years. The Orphans court of *Charles* County dismissed the petition, and the appellees contend that their judgment ought to be affirmed, because it is clear from all the proceedings in the Orphans court, that the question had received their deliberation and investigation, and according to the testamentary system, there was no right reserved to a subsequent court to review and revise said decree.

The Orphans court cannot exercise any jurisdiction by implication; it is a court of granted powers, given by statutes; and in the act of 1798, ch. 101, sub-ch. 15, sec. 20, there is a positive prohibition of all incidental power, or constructive authority. See *Scott vs. Burch*, 6 *Harr. & John.* 67.

By the statutes of *Maryland*, the Orphans court have an exclusive and an original jurisdiction in all cases of wills of personal property. The mode and manner of proving such wills are detailed in the act of 1798, ch. 101, sub-ch. 2, sections 1 to 13; and I think it must be conceded, by a fair and proper construction of all of the preceding sections, that no power of review is reserved to the court, when all the parties interested have been summoned and the will admitted to probate, and particularly, to one of the parties who appeared to the citation, and acquiesced in the judgment of the court for six years. It is in vain then for the appellant to invoke any

of the preceding sections to justify the Orphans court to review the order or decree of the Orphans court of 1839. It was binding and conclusive upon *William G. Robey*, the present appellant, who knew of said order, and acquiesced in it.

But it is contended, that the paper was admitted to probate, without contest and without evidence. The 15th sub-ch. sections 16 and 17, authorize the court to order plenary proceedings, when they may think proper, in a case of contest; but these sections have no application to this case. Here the party appellant appeared in court, and whether he contested or not, is immaterial, as he appeared to be satisfied with the evidence, and acquiesced in the judgment of the court, and hence, there was no necessity to reduce the evidence (upon which the court predicated their opinion,) to writing. But by the 1st sec. of the act of 1818, ch. 204, it is enacted, "that in all decrees, orders, decisions and judgments hereafter to be made by any Orphans court of this State, the party or parties who shall deem him, her or themselves aggrieved by such decree, order, decision or judgment, may appeal to the Court of Appeals." Here was a party appearing in the Orphans court, asking a continuance of the case—aware of the judgment of the court, and acquiescing in the decree for six years—does not appeal, and now asks for a review. Is he entitled to the indulgence and consideration of this court? He reposes upon the wrong—of which he now complains—for six years; and after the death of an important witness, and the decision of the Court of Appeals upon the will and the testamentary paper, (See *Hannon* and *Hannon vs. State, use of Robey*, at December term, 1843,) he appears in the Orphans court and files his petition for a review, upon the ground that there was error in the decree of 1839. By a reference to the two papers, the testator used the same language in giving one-half of his personal property to his two sons in the bill of sale, and one-third to his daughter in the will. He exhibits confidence in his sons, leaves them his executors; but in the last paper, he does not devise and bequeath them a dollar. Why did he not? He

recognized the validity and existence of the bill of sale, and when giving to his daughter, *Grace Ann Robey*, one-third of his property, he uses the following significant language: "*I give to my daughter one-third of my property that I die possessed of, and not otherwise willed and disposed of.*" *Frederick Nelson*, one of the witnesses to his will, was the writer of it, and looking to the language of the will and its devises and bequests, the inference is irresistible, that it was made in view of the existence and validity of the bill of sale, and all of its provisions were made with an understanding, that the bill of sale was to be taken and considered as a part of his will.

The appellees were prepared to prove by *Frederick Nelson*, the fact of the re-publication of said bill of sale at the time said paper was admitted to probate; but *Frederick Nelson* is now dead, having departed this life in 1844: and if the court now determine that the appellant can review this case in the Orphans court six years after a decree, and after sleeping six years upon it, and after the death of *Frederick Nelson*, the intimate friend and draughtsman of the will of *Walter W. Hannon*, it may be productive of great injustice to the appellees.

The objection that the testamentary paper was not proved, is entitled to little consideration. It was a paper that proved itself; and as the party now invoking the aid of this court was present in person and by *Walter Mitchell, Esq.*, as his attorney in the Orphans court, it is conclusive that he admitted it, or such evidence was taken as satisfied him and justified the court in passing their order.

The appellant also contends, that the order or decree of the Orphans court was not signed by the judges, and therefore, not such a decree as the law required; and they refer to the 3d section of the act of 1818, ch. 204, in support of their objection. The counsel for the appellees will refer the court to the 1st section of the same act, as a conclusive and satisfactory answer to the objection. The case of *Allen vs. Dundas*, 3 *Term Reports*, 125, is not an authority in point. That case supposes fraud in the obtention of a probate, and fraud vitiates

every thing; but in this case, no fraud, surprise or impropriety is or could be alleged against the appellees, and particularly by the appellant, who was present in person and by attorney in the Orphans court.

This court has decided that this decree could not be questioned, when coming up incidentally in another court,—and as the Orphans court is a court of competent jurisdiction, and indeed, in wills of personal property, of exclusive jurisdiction, it is conclusive and binding upon the parties interested. 1 *Wm's Ex'rs*, 158. So upon the law, the merits and justice of the case, the appellees are entitled to have the judgment affirmed.

This court reversed the order, and passed the following decree:—

This cause coming on to be heard, having been argued in writing and fully considered by the court, it is thereupon, this 13th February, in the year 1846, by the Court of Appeals aforesaid, and by and with the authority of the same, ordered, adjudged and decreed, that the decree of *Charles* County Orphans court of the 29th August, in the year 1845, be and the same is hereby reversed, with costs to the said appellants, both in the Orphans court and in this court; and this court, proceeding to decree as the Orphans court aforesaid should have decreed upon the petition of the said appellant, filed in said Orphans court, do further order, adjudge and decree, that the indenture of the 8th September, 1832, of *W. W. Hannon*, is not a testamentary paper, and should not have been admitted to probat and record, and that the order of the said Orphans court of June term, 1839, directing such indenture to be recorded, is null and void.

DECREE REVERSED WITH COSTS.

GEORGE HARRISON AND SAMUEL CALHOUN, *Partners trading under the Firm of* DUNCAN, CALHOUN & CO. *vs.* DAVID GREEN, *trading under the Firm of* GREEN & CO.—*June*, 1848.

The owners and consignors of certain packages of goods took from *S. & Co.* common carriers in the city of *Phila.* a receipt, by which said carriers agreed to forward said goods, directed to the owners at "*Georgetown, Ky.*" from the former city to *Cumberland*, and there deliver the same to the four-day line agent. Upon the back of this receipt, the consignors afterwards wrote and signed the following endorsement: "*Messrs. Green & Co.* at *Cumberland*, deliver the goods on the within receipt for four-day line to *Duncan, Calhoun & Co.*" and delivered the same to said *D. C. & Co. G. & Co.* to whom this endorsement was directed, resided in *Baltimore*, and were common carriers, and as such, were in the habit of forwarding goods sent by *S. & Co.* from *Phila.* to *Baltimore*, through to *Cumberland. Held*,

That the delivery of this receipt, with its endorsement to *D. C. & Co.* by the appellants, and an exhibition thereof by them to *G. & Co.* the appellees, though accompanied by a tender to pay the charges due on said packages, did not give the appellants the right to maintain an action of replevin for the goods.

APPEAL from *Allegany* County Court.

This was an action of *replevin*, instituted by the appellants on the 13th April, 1846, against the appellee for the recovery of sixteen packages of goods marked, "*McCalla & Rankin, Georgetown, Kentucky*," in the possession of the defendant as a common carrier.

The goods were replevied by the sheriff and appraised at $6,250. The defendant then moved to quash the writ, for the following reasons: 1st. Because the plaintiffs did not file with the clerk of the court a bond in a sum double the value of the goods replevied and delivered. 2d. Because it appears from the proceedings, that they filed a bond of only $500, and the goods replevied from the defendant and delivered to the plaintiffs, were appraised at $6,250.

This motion the court overruled, and the defendant then pleaded the following pleas:—

1st. *Non cepit.* 2d. Property in the defendant *Green.* 3d. Property in *Samuel Brewer*, agent of the four-day line. 4th. Property in the firm of *Adams & Co.* 5th. The defendant avows the taking, because he is a forwarding commission merchant and common carrier in the city of *Baltimore*, engaged in forwarding and carrying goods from said city to the *Baltimore and Ohio Rail-road Depot*, at *Cumberland*, and on the 9th April, 1846, received the packages in question under a contract with *Adams & Co.*, to forward the same to the Rail-road Depot at *Cumberland*, and there to deliver the same to the agent of the four-day line, viz: one *Samuel Brewer*, and did forward and *deliver* the same accordingly before the issuing of the writ original in this cause.

The plaintiffs replied to the 1st, 2d, 3d and 4th pleas, and demurred to the 5th. This demurrer being overruled, issues were afterwards joined on all the pleas.

1st Exception.—At the trial, the plaintiffs to maintain the issues on their part, offered in evidence the following receipt:

"Adams & Co's Express."

"Eastern, Western and Southern Package Express, for the conveyance of merchandise, specie, baggage, &c. &c., and insurance effected, whenever required on any package, to its full amount of value. Offices:—9 *Court* street, *Boston;* 17 *Wall* street, *New York;* 80 *Chesnut* street, *Philadelphia;* 7 *Light* street, *Baltimore;* *Pennsylvania Avenue*, *Washington.*

"N. B.—*Adams & Co.* are alone responsible for the loss or injury of any article or property of any description entrusted to their care; nor is any risk assumed by the owners of the *New York* and *Norwich* steamboats, the *Norwich* and *Worcester* and *Boston* and *Worcester Rail-road Companies*, or any of the Companies transporting their cars.

"*Philadelphia, April* 8, 1846.

"Received of Messrs. '*McCalla & Rankin*,' sixteen packages, marked *McCalla & Rankin, Georgetown, Kentucky*, which we promise to forward to *Cumberland*, and deliver to the four-day line agent, (loss by fire, water, breakage, leakage and perils of the seas excepted.) *For* Sanford & Co."

"Which receipt was admitted to be in the hand-writing and given by *Sanford & Co.*, common carriers in the city of *Philadelphia*, and also exhibited an endorsement on the back of the said receipt, as follows:—

"*Messrs. Green & Co.* at *Cumberland*, deliver the goods on the within receipts for four-day line to *Duncan, Calhoun & Co.*

McCALLA & RANKIN, *of Georgetown, Ky.*"

And proved by the testimony of *F. C. McCalla and Harrison Rankin*, competent witnesses, taken under a commission issued for that purpose, that the sixteen packages specified in the said receipt so endorsed, were the property of the said *F. C. McCalla & Harrison Rankin*, partners trading under the firm of *McCalla & Rankin*, at the time the endorsement was made, and that said *McCalla* had signed the writing on the back of said receipt, in the name of said *McCalla & Rankin*, on the eleventh day of April, 1846, in the town of *Cumberland*, and handed said receipt then and there, with its endorsement, to the plaintiffs.

And then proved by *George Shafer*, a competent witness, that said *Shafer*, as the agent of the plaintiffs, who are merchants in the town of *Cumberland*, presented the receipt, with its endorsement, on the 11th April, 1846, to *George J. Caldwell*, the agent of the defendants, and that said *Shafer* then requested said *Caldwell* to furnish him the amount of the charges due upon the said packages, and offered to pay the same, and that said *Shafer*, at the same time, requested *Caldwell* to deliver said packages to him for the plaintiffs. That said packages were at that time in the possession of said *Caldwell*, as agent for the defendants. But that *Caldwell* refused to furnish said *Shafer* with the amount of said charges or to receive the money for the same, and positively refused to deliver said packages to the plaintiffs.

The plaintiffs then proved by *George J. Caldwell*, a competent witness, that he is the agent of *Green & Co.* in *Cumberland*, and that said *Green* resides in *Baltimore*. That *Green & Co.* are in the habit of carrying goods sent through *Sanford*

& Co. by *Adams' Express Line*, from *Philadelphia* to *Baltimore*, through from *Baltimore* to *Cumberland*. That witness received the sixteen packages in *Cumberland* from *Green & Co.*, by rail-road on the 11th April, and that the packages were charged with freight as from *Philadelphia*.

The defendants then proved by said *Caldwell*, that the Saturday preceding the issue of the replevin the receipt, with its endorsements, was shown to him by *George Shafer*, but the witness said that the said endorsement was not accompanied by the direction to "*Messrs. Green & Co.*"

The defendants further proved by said *Caldwell*, that he had spoken with *Samuel Brewer*, the agent of the four-day line at *Cumberland*, on Saturday the 11th April, to forward the said packages to *Wheeling*, and that said *Brewer* agreed to take said packages, and upon the ensuing Monday after said *Brewer* had agreed to take said packages, said *Brewer* had his wagon at the warehouse of *Agnew & Co.* where *Caldwell* had placed them by the direction of *Brewer*, and where *Green & Co.* did business, with intent to take the same. And also that the said packages were in the warehouse so occupied, when the writ of replevin was executed. Said *Caldwell* also stated that he had delivered the sixteen packages to *Samuel Brewer*, the agent of the four-day line, before the replevin was served.

The plaintiffs then proved by *Samuel Brewer*, the agent of the four-day line, that he never had possession of the said sixteen packages, and that they never were delivered to him as such agent, and further proved by the return of the sheriff, that the said sixteen packages were taken out of the possession of *Green & Co.*

The plaintiffs also proved by *George Shafer*, that the direction of *Green & Co.*, was contained in the endorsement on the receipt, when it was exhibited by him to *Caldwell*.

And thereupon the plaintiffs prayed the court to instruct the jury, that if they should believe from the evidence in the cause, that the said *McCalla & Rankin* were the owners and consignors of the packages in controversy upon the 11th April, 1846, and that the said *McCalla & Rankin* being such

owners and consignors, had delivered the receipt for the said packages, with its endorsement, to the plaintiffs in this cause on that day, and that the said plaintiffs had caused the said receipt, with its endorsement, to be shown to the agent of the defendants, and had offered to pay all charges due thereon, and that the defendants had refused to accept the amount of the said charges, and to deliver the said sixteen packages to the plaintiffs, and if they should further find that the said defendants, at the time of the execution of the writ of replevin, were in possession of the said packages, by virtue of the receipt of *Sanford & Co.*, that it is competent for the said plaintiffs to maintain their action for the said packages, and that their verdict must be for the plaintiffs accordingly.

Which opinion and instruction, the court (MARTIN, C. J. and BUCHANAN, A. J.) refused to give, but instructed the jury that the delivery of the said receipt, with its endorsement, by the said *McCalla & Rankin* to the plaintiffs, although accompanied by an exhibition of the said receipt and endorsement to the defendants, and a tender to pay the charges due on the said packages, did not give the plaintiffs the right to sue in this action, and that their verdict must be for the defendants.

To which refusal to grant the said prayer of the plaintiffs, and to the opinion and instruction of the court, the plaintiffs excepted, and appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE, and FRICK, J.

By JOHN T. EVANS and WM. PRICE for the appellants, who contended:—

1st. To maintain the action of *replevin* in *Maryland*, no further title is necessary in the plaintiffs other than a right to the possession of the property replevied, as against the defendant.

2d. That the possession of a common carrier's receipt for the conveyance of goods, forwarded by the *owner* of the goods on his own account, and given to said *owner* as *consignor* of the goods, endorsed over by the owner, with an order to the car-

rier or his agents, to deliver the goods contained in the receipt to a third party, and the exhibition of the receipt, with the order of the owner to the common carrier or his agents, by the party to whom it has been endorsed, accompanied by a tender of all charges due to said carrier, entitles the holder of the receipt, with the order, to the *possession* of the goods specified in it, as against the common carrier.

McKaig for the appellee, insisted:—

1st. That the appellants had neither a general or special property in the goods, and therefore, could not bring this action in their own names.

2d. The endorsement by *McCalla & Rankin*, on the bill of lading conveyed to plaintiffs no property in the goods, but was a mere order or authority to receive the goods, as the agent of the owners, was without consideration, and therefore, did not authorize the plaintiffs to institute the action of replevin.

3d. The plaintiffs never had possession of the goods, in virtue of which alone, a special property in the goods could have been obtained by them, and there is no pretence, that they had any general property in the goods,—they could not, therefore, maintain replevin for the goods.

By the Court: JUDGMENT AFFIRMED.

Eve Walgamot, *Guardian of* Nancy J. Walgamot *vs.* Charles W. Davis.—*June*, 1848.

The act of 1845, ch. 166, requiring trustees to whom any property shall be conveyed for the benefit of creditors, to file with the clerk of the court, where the deed creating the trust is recorded, a bond conditioned for the faithful performance of the trust, is confined in its operation to deeds executed since that act took effect.

Appeal from *Washington* County Court.

The appellant, as guardian of *Nancy J. Walgamot*, on the 1st April, 1847, filed a petition in *Washington* County Court,

alleging that she was a creditor to a large amount of a certain *John Davis*, who had conveyed all his property to his son, *Charles W. Davis*, for the benefit of his creditors. That said trustee has given no bond for the faithful performance of his trust as required by law, as will appear from the certificate of the clerk of *Washington* County, hereto attached. Your petitioner therefore prays your Honors to pass an order requiring the said trustee to give a bond, with security, according to the statute in such cases made and provided.

The following is the certificate referred to in this petition:—

"To the Honorable, the Judges of
Washington County Court:

"I hereby certify that *Charles W. Davis*, trustee for the benefit of the creditors of *John Davis*, by deed of trust, dated sixth day of October, 1845, and recorded among the land records of this county, has not filed with me, as clerk of *Washington* County Court, any bond for the faithful performance of his trust, as required by act of Assembly, passed at December session, 1845, ch. 166.

ISAAC NESBITT, *Clk.*"

The court (BUCHANAN, A. J.,) ordered this petition to be dismissed with costs: from which order, this appeal was taken.

The first and second sections of the act of 1845, ch. 166, passed on the 28th February, 1846, to which reference is particularly made in the opinion of the court in this case, are as follows:—

SECTION 1. "*Be it enacted by the General Assembly of Maryland*, That from and after the first day of May next, it shall be the duty of all and every trustee and trustees, to whom any estate, real, personal, or mixed, is or shall be limited or conveyed for the benefit of creditors, or for any other purpose, to file with the clerk of the County Court, in which the deed or instrument creating the trust may be first recorded, a bond in such penalty as the clerk may prescribe, being as nearly as can be ascertained, double the amount of

the trust estate, and with surety, to be approved by the said clerk, conditioned for the faithful performance of the trust by the said deed, or other instrument of writing, reposed in such trustee or trustees, which bond shall be recorded in the office of said clerk, and a copy thereof, under his official seal, shall be evidence in any of the courts of this State.

SEC. 2. "*And be it enacted*, That if any such trustee or trustees, shall fail or refuse to give bond as aforesaid, for the space of three months after the deed or other instrument of writing creating the trust, is deposited with the clerk to be recorded as aforesaid, it shall be the duty of the said clerk to give notice thereof to the County Court of the county, or some one of the judges thereof, who, upon consideration of the circumstances, and upon such reasonable notice as the court or the judge may prescribe to the trustee, and such of the parties interested as may be conveniently served therewith, shall proceed to appoint another trustee or trustees, in lieu of the trustee or trustees, who shall have failed or refused as aforesaid, and upon the trustee or trustees so appointed by the court or judge giving bond as aforesaid, the whole trust estate shall vest in him, her or them, subject to the provisions of the trust deed or instrument of writing creating the trust, and the same power may and shall be exercised by the court or judge from time to time, until a trustee or trustees shall be appointed and qualified to act, by giving bond as aforesaid."

The cause was argued before DORSEY, C. J., MAGRUDER, MARTIN and FRICK, J.

By JOHN THOMPSON MASON for the appellant, and

By GEO. SCHLEY for the appellee.

MAGRUDER, J., delivered the opinion of this court.

The appeal in this case was taken by the appellant from an order of *Washington* County Court, dismissing a petition filed therein by her. The petition is grounded on the act of 1845, ch. 166, 1st and 2d sections, and asked that the appellee be

required to give security, agreeably to the said act. The deed of trust was executed in October, 1845, some time before the act of Assembly was passed.

Whether this law embraced deeds executed and recorded before its passage, is the question.

We are of opinion, that the law is confined in its operation to deeds executed since the act of 1845 took effect. The court below was therefore correct in dismissing the petition.

If this law required trustees named in deeds executed before its passage, to give bond, then every trustee whose deed is placed upon record, must comply with its provisions. This surely was not the design of the General Assembly.

The second section requires the clerk to give notice to the County Court, or some one of the judges thereof, when any trustee has failed or refused to give the bond required of him, for the space of "three months after the deed or other security is deposited with him to be recorded." If the act of Assembly required this of the appellee, then he might have been removed, and another trustee appointed, because of his failure to do an act never required but by this law, and yet to be done by him before the law was in existence.

The words of the act of Assembly will not warrant the construction, that trustees named in deeds executed and recorded before its passage, shall give bonds within three months after its passage. It is express that the bond, if to be executed at all, is to be given within three months after the deed "is deposited with the clerk to be recorded."

ORDER AFFIRMED.

THOMAS DUFFY *vs.* CHARLES B. CALVERT, *Exec'r of* GEORGE CALVERT AND OTHERS.—*December*, 1848.

A controversy respecting the validity of the will of *T. C.*, was adjusted by the heir-at-law, conveying by deed all her interest in the real estate of the testator to *G. C.* the executor and ulterior devisee under the will, *in trust* "first to pay her the sum of $30,000," and after reimbursing himself the expenses incurred in contesting the will, then in *further trust*, "for the purposes and trusts expressed in the said will of *T. C.* and the codicils thereto." These trusts were for payment of several annuities and pecuniary legacies to persons specially named, charged upon the lands which the executor had power to sell for that purpose. By one of the codicils, it was provided, that if the provisions of the will should fail, then the estate was to go to "*G. C.* and his heirs." In 1837, *G. C.* as trustee under this deed, sold a part of the lands to the appellant, and afterwards died, leaving the appellee his executor, who in 1841, recovered judgment upon three of the bonds of the appellant, given for the purchase money. This judgment was revived in 1846, and a *fi. fa.* issued thereon; the last instalment of the purchase money having, in the mean time, become due. The appellant then filed a bill in Chancery against all the heirs of *G. C.* and all the *cestui que trusts* under the will, many of whom were minors, to enjoin the executor until a trustee should be appointed by the court, to receive and apply the whole purchase money, which he is willing to pay whenever there is a person in being competent to convey the land so sold to him by *G. C.* in his life-time. *Held*,

That upon the death of *G. C.* the trust descended to his heirs-at-law, some of whom being minors, were legally incompetent to discharge its functions; and the purchaser, being bound to see to the application of his purchase money, has adopted the true and safe course for his protection.

A proceeding in equity against the heirs of *G. C.* for a title, would not discharge the purchaser from seeing to the application of his purchase money, and therefore, the *cestui que trusts* of the will are necessary parties to any proceeding looking to a conveyance to the appellant.

Any attempt to enforce payment of the purchase money, without such assurance of title, was properly met by the appellant, in bringing before the court all the parties in interest united, and enjoining them until a trustee should be substituted for the original trustee, to receive and apply the purchase money, and convey the lands.

By the act of 1831, ch. 311, sec. 11, mere naked trusts, where the trustee has no beneficial interest or estate whatsoever in the lands, descend to the heir at common law.

But in this case, the right of the trustee to reimburse himself out of the trust in his hands, the heavy expenses incurred in the attempt to sustain the will, and the ulterior limitation in his favor in the codicil, are clearly such beneficial interests as must exclude this trust from the operation of that act.

Where trusts are general, as for payment of debts generally, the purchaser is not bound to see to the application of his money, but if for payment of legacies or debts, scheduled or specified, the trust being defined and limited, he is so bound.

In this case, the trusts being for payment of annuities and pecuniary legacies to parties specially named, and which by the instrument creating them, are expressly charged upon the lands: they are precisely such charges as the purchaser is to see extinguished.

When it is said in *Willis on Trustees*, 56, "trusts, when of realty, devolve by the death of the trustee on his heir-at-law; when of personalty, they vest in his executor or administrator," it is not meant that where the trust is originally of personal estate, and has been in part executed by sale by the original trustee, it can become personalty, and be consummated by the executor. All the authorities agree, that where the legal estate descends to the heirs-at-law, the trust is transmitted with it.

In equity, the party beneficially entitled to the produce of the estate—that is to say, the *cestui que trust* of the purchase money, and not the trustee or donee of the power of sale, is considered to be the owner.

Unless the trustee is authorized by the terms of the deed itself, to give a receipt and discharge the purchaser from seeing to its application, or the trusts are undefined and general in their nature, the rule is uncontroverted, that the purchaser must see his money properly applied.

The right to a good title, is a right not growing out of the agreement between the parties, but given by the law, that as the purchaser parts with good money, the vendor shall give an estate with a clear title.

APPEAL from the Court of Chancery.

On the 22d February, 1847, the appellant filed his bill against *Charles B. Calvert*, executor of *George Calvert* and others, alleging that *Thomas Cramphin* died in the year 1830, leaving a last will and testament, and codicils thereto, by which he appointed *George Calvert* his executor and residuary legatee. That probate of said will was contested; a *caveat* being filed thereto by *Thomas Davis* and *Elizabeth*, his wife, who was the heir-at-law of said *Cramphin*, upon which such proceedings were had, as that the said will was refused to be admitted to probate, and so the said *Cramphin* died intestate. That afterwards, on the 1st December, 1835, the said *Elizabeth*, heir-at-law as aforesaid, having survived her husband, and the said *George Calvert*, in pursuance of an agreement entered into between them, executed a certain indenture, whereby the said *Elizabeth* conveyed to the said *Calvert*, all the real estate

of which said *Cramphin* died seized or possessed, *in trust* that said *Calvert* should first pay to said *Elizabeth*, the sum of $30,000, and then reimburse himself for the amount so paid, and all expenses theretofore incurred by him in contesting said will, and then hold the said estates and the proceeds thereof, to and for the same uses and trusts, as are expressed in said will of *Thomas Cramphin*, and the codicils thereto. That further, in pursuance of said agreement, the said *Calvert* became administrator of the personal estate of *Cramphin*, all of which was disposed of by him as such administrator, in his life-time.

That as trustee under said deed, and by virtue of the powers thereby given him, said *Calvert*, on the 12th August, 1837, sold a portion of said real estate to complainant, for which he executed his four single bills in favor of said *Calvert*, as trustee, each for the sum of $713 12½, payable in one, two, three and four years respectively, and dated the said 12th August, 1837.

That said *George Calvert* afterwards died, leaving a last will and testament, by which he appointed his sons, *Charles B.* and *George H. Calvert*, his executors, and that said *George H.* having renounced said trust, letters testamentary were duly granted to said *Charles B. Calvert*, who afterwards as such executor, instituted suit in *Montgomery* County Court upon three of said bills, and recovered judgment thereon in March, 1841. That in November, 1846, this judgment was revived by a *scire facias*, and a writ of *fi. fa.* issued thereon, which has been laid upon the lands and effects of the complainant, which have accordingly been advertised for sale by the sheriff.

The bill further charges that complainant purchased said lands from *George Calvert*, under an assurance and promise from him, that he would give a good and valid title thereto. That relying upon this promise, he has made great improvements upon the lands, and greatly enhanced their value. That since the death of said *George Calvert*, intestate, as to the trust estate conveyed to him by said *Elizabeth Davis*, your orator is advised the said trust and power to convey a good title, is not in his executor, *Charles B. Calvert*, but is either suspended

until a trustee is properly appointed by a court of equity, or vested in the heirs-at-law of said *George* generally, or in his heirs and those of said *Elizabeth Davis*, conjointly. That the lands so purchased by him are charged with the trusts created by the indenture before referred to, and that it is incumbent upon a purchaser under said trust, to see that the funds are paid to a person legally and equitably authorized to receive and apply the same, otherwise they may be made chargeable again. That the provisions of the said deed of trust have not been complied with by said *George Calvert;* and although your orator is anxious and willing to pay the purchase money for said lands, if a good title thereto can be had, he is advised that he cannot safely pay the same to *Charles B. Calvert*, executor as aforesaid, because he is not the trustee, and has not the power to convey the lands, or to give your orator an entire acquittance and discharge, so as to relieve him and the lands from all future liability on account of the same.

The bill then prays for an injunction, restraining execution of the judgment against complainant, for the appointment of a trustee, to receive the purchase money and convey the lands to him, and for general relief. The heirs-at-law of *George Calvert*, some of whom are minors, and the legatees under *Cramphin's* will, who are the *cestui que trusts* mentioned in the aforesaid deed of trust, were made defendants to this bill.

The will of *Cramphin*, Exhibit A, was executed the 30th June, 1824. The testator, after payment of debts, &c. and a conditional devise of certain real estate to his nephew, *Dr. John Bowie*, bequeaths to *Elizabeth Williams*, a negro woman and $500, and to *Arianna*, *Elizabeth* and *Anne Williams*, her three daughters, each a negro slave and $500; to *Richard Williams*, her son, a negro slave and $1,500; to *Caroline Calvert*, her choice of ten negroes—all his household and kitchen furniture—all his plate, liquors, groceries, provisions, &c.—all the crops growing on his dwelling plantation, stock and farming utensils, &c. thereon; and also devises to her, all said dwelling plantation, containing between eight hundred and one thousand acres of land, for and during the term of her single life. "And

lastly, all the rest and residue of my estate, real, personal and mixed, legal and equitable, I hereby give and devise in fee simple, to my confidential friend, *George Calvert*, of *Prince Georges'* County, *Maryland*, in trust for the support, education and benefit of the children of the said *Caroline*, viz: *George*, *Caroline*, *Elizabeth*, *John*, *Henry*, *Henrietta*, *Maria*, *Thomas*, *Adolphus*, *Marietta* and *Richard*, with power to appoint and keep under him, agents and managers from time to time, to attend to the said property and estate, who are to be under his control and direction, and with power and authority also, if he shall think it most for the benefit of the said children, to sell all the said estate and property, or any part thereof, at public or private sale, (with power also to convey the same to the purchaser or purchasers thereof,) and the proceeds of such sales to re-invest in whatever way he shall think best, for the fulfilment of this trust, and to divide and apportion among the said children and their heirs, the said estate and property, and the profits and proceeds thereof, equally, as they severally arrive at the age of twenty-one, as to the males, and of eighteen, as to the females, or as they severally become married; and if either of the said children should die under age and without issue, then the survivors to be entitled to the share or interest of such child or children so dying; and in case all the said children should die, or should be in any manner incapable to take the benefit of this trust from any cause whatsoever, then the said *George Calvert* is to hold all the said estate and property, in trust for the said *Caroline Calvert*, her heirs and assigns forever;—and I do hereby constitute and appoint the said *George Calvert*, executor of this my last will and testament, revoking," &c.

By a codicil, dated 1st November, 1824, the testator revokes the provisions of his will in favor of *Caroline Calvert*, and in lieu thereof, among other things, directed his executor to pay her an annuity of $500 *per annum* during her life, and further wills and directs that the said property devised and bequeathed to the said *Caroline*, should be vested in his trustee and executor, "in fee simple, to be held and applied by him to the

purposes and trusts contained and set forth in my said last will and testament, in the last clause and section thereof." By a second codicil, dated the 14th October, 1825, he revokes the devise of land to his nephew, *Dr. John Bowie*, and directs the same to go with the rest of his estate to his friend, *George Calvert*, "his heirs or assigns," according to the last section of his said will, and then proceeds: "I do hereby further devise, that all the estate, real, personal and mixed, of which I may die seized and possessed, or to which I have any right or title, and which may not be devised by my said will and the codicils thereto, or which may not be effectually devised, or which may be devised to persons under any legal disability to take the benefit thereof, shall go to the said *Geo. Calvert*, his heirs and assigns forever."

Exhibit *B* is the indenture referred to in the bill between *Elizabeth Davis* and *George Calvert*. It is dated the 1st December, 1830, and after reciting the execution of the will of *Cramphin*, with its codicils, and the successful contestation of the same by said *Elizabeth* and her husband, *Thomas Davis*, "And whereas, by the force and effect of the said proceedings, the said *Thomas Cramphin*, appears to have died intestate, and the said *Elizabeth Davis* is the heir-at-law and next of kin of the said *Thomas Cramphin*, and as such, entitled to all the real and personal estate and effects of the said deceased;" proceeds to convey to said *George Calvert*, "his heirs and assigns forever," all the real estate of which *Cramphin* died seized and possessed, and the rents and profits thereof from the time of his death, "*in trust* that he shall, in the first place, pay and satisfy the said *Elizabeth Davis*, her executors," &c. "the sum of $30,000, which shall be and remain the first lien upon the estate hereby granted, as fully as if secured by a deed of mortgage;" and after payment of this sum, "then *in trust* that he, the said *George*, shall and may reimburse himself the said amount so paid to the said *Elizabeth*, and all and every such expenses and disbursements, which he, the said *George*, has heretofore made and incurred in and about the contestations respecting the said estate, or the agency in the management of

the same, or which he may hereafter incur, in and about the same, and which would, or ought to be allowed to him in the settlement of his account as executor or trustee, in case the said instruments and writings had been established as the last will and testament, and codicils thereto, of said *Thomas Cramphin*, deceased,—and that subject to and after the payment and reimbursement as aforesaid, then to hold, apply and appropriate the estates hereby granted, or in case of the sale of them, or any part thereof, the said proceeds to and for the same uses, trusts, purposes and objects as are expressed and declared in the said instruments of writing, purporting to be the last will and testament, and codicils thereto, of said *Thomas Cramphin*, deceased."

The bonds of the purchaser and a copy of the judgments recovered thereon, are also filed with the bill.

The Chancellor (JOHNSON) ordered the injunction as prayed.

The answer of *Charles B. Calvert* admits the death of *Cramphin*, the execution of his will and codicils thereto, the successful contestation of the same by *Davis* and wife, the execution of Exhibit B, the granting of letters testamentary on the personal estate of *Cramphin* to *George Calvert*, the sale of the land by him to complainant, his subsequent death, leaving a last will and testament, which being executed prior to Exhibit B, defendant is advised to admit that the legal estate in the lands conveyed, subject to the said trusts and to the sales, or agreements for sale, made by said *George Calvert*, descended to all his children and heirs-at-law. It is also admitted that letters testamentary on the estate of said *George*, and letters of administration *d. b. n.* on the estate of *Cramphin* were granted to defendant. That respondent, as executor of said *George*, instituted suit and recovered judgment as charged in the bill, and that he has ordered execution thereon, and he insists on his right so to do, since the title to the land sold to complainant is unquestionable, and the latter has had ample time within which he might have obtained a conveyance therefor from the heirs of said *George Calvert*, deceased. He is advised to deny that the legatees or devisees named in the said

last will and testament of said *Cramphin,* and codicils thereto, are material or necessary parties to the suit.

The Chancellor, on the 16th May, 1848, dissolved the injunction by the following order:—

By the will and codicils of the late *Thomas Cramphin*, executed in the years 1824 and 1825, he devised and bequeathed, in fee simple, to his friend, *George Calvert*, his real and personal estate, upon certain trusts; and with power to the trustee, in his discretion, to sell the whole, or any part of said estate, and to convey the same, and to invest the proceeds as he might think best for the fulfilment of the trust.

It does not appear to me to be material to examine, critically, the provisions of these instruments, for the purpose of ascertaining the precise nature of this trust. It is sufficient to say, that there can be no doubt of the power of the trustee to sell and convey the trust property; nor can it be doubted, that the trustee, making such sale, could sue and recover the purchase money as could the executor of the trustee, upon a note or bond taken by him to secure its payment; and indeed, the judgment itself is conclusive in favor of such right.

The trustee, in pursuance of the power vested in him, did in August, 1837, sell to the plaintiff in this case, parcel of the real estate of the testator, *Cramphin*, and took from him his four several sealed notes, for $713 12 each. *Calvert*, the trustee, having died, and three of the notes being due and unpaid, suit was brought upon them by the defendant in this case, as executor of the trustee; and at March term, 1841, judgment was rendered upon them. This judgment not being paid, a *scire facias* was sued out upon it, and a *fiat* entered at November term, 1846, upon which the writ of *fieri facias* was issued to March term, 1847, of the *Montgomery* County Court.

The bill filed in this case prays for, and an injunction was granted, to stay execution upon this judgment, upon the ground of obscurity in the title to the land purchased, or at least, the difficulties which now environ it, caused by the death of the trustee who made the sale.

The purchaser, it seems, was let into possession at the period of the purchase, and has remained so in possession to the present period. One of the allegations to the bill being that he has since his purchase, essentially enhanced the value of the property, by building, planting and fencing. The judgment to stay execution, upon which the bill was filed, was rendered upon three of the notes given for the land; the fourth at that time not having matured: and the question therefore now is, shall the purchaser be protected by the injunction of this court from the payment of these instalments, until it is fully ascertained through what channel the title is to be passed to him. This title he cannot get, nor was it the agreement of the parties he should get, until the whole purchase money should be paid. He had been in the possession and enjoyment of this property for nearly ten years when he filed this bill; had suffered two judgments at law, the original and the *fiat*, to be recovered against him, and then asks for equitable relief, not upon the ground of blemish in the title of his vendor, (for that must be conceded to be good,) but upon the ground, that there is now some difficulty in determining by whose hand that title is to be conveyed to him. It is said by *Sugden*, that "if a purchaser take possession under a contract, and he afterwards rejects the title, he must relinquish the possession, and equity cannot prevent the vendor from turning him out by an ejectment, although he may have expended money in improvements." 2 *Sugden's Vendors*, 15.

But here, the purchaser retains the possession, and asks the aid of this court to arrest the vendor in his attempt to collect the purchase money, or rather a part of the purchase money, upon the payment of which part, he would not be entitled to a conveyance of the title; not upon the ground of a defect in the title itself, but upon a doubt as to the person by whom the title, at the proper time, is to be conveyed.

There can be no doubt, either that the title has descended upon the heirs-at-law of the trustee, as the answer supposes, or that this court is competent, at the proper time, to authorize

a transfer of it to the purchaser; and in either case, when he has a right to call for it, he will receive a conveyance.

For this reason, I am of opinion that the injunction must be dissolved.

From this order, the complainant appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN and FRICK, J.

By RICHARD J. BOWIE for the appellant.

The injunction in this case, was applied for on the ground, that there is no hand, in legal being, to receive the purchase money; and payment to the legal plaintiff, *Charles Calvert, ex'r of George*, would be payment in the complainant's own wrong, and in wrong of the "*cestui que trusts*" of *Elizabeth Davis*, whose deed to *George Calvert*, deceased, created such trusts, as obliged the complainant, to see to the application of the purchase money. The deed of *Mrs. Davis* to *George Calvert* sets up the will and codicils of *Thomas Cramphin*, which had been before set aside, and charges all the real estate conveyed by her to *George Calvert*, with payment of the legacies given by the said *Cramphin*, in his will and codicils, after first paying the grantor a specific sum, and reimbursing the grantee certain costs, charges, and expenses.

The terms by which these trusts are created are as follows:

"In trust to hold, apply, and appropriate the estates hereby granted, or in case of the sale of them, or any part thereof, the said proceeds, to and for the same uses, trusts, purposes and objects, as are expressed and declared in the said instruments of writing, purporting to be the last will and testament, and codicils thereto of the said *Thomas Cramphin*," (*vide* deed from *Elizabeth Davis* to *George Calvert*, 1st December, 1835.)

The death of *George Calvert*, the original trustee, is admitted; the deed makes no provision for the appointment, or substitution of other trustees, upon his death: in the absence of which, the legal estate in the lands conveyed by *Mrs. Davis*, and purchased in part by complainant, devolved upon the heirs-

at-law of said *Calvert*, some of whom are minors: the will of said *Calvert* appointing *Charles Calvert*, the appellee, and another, his executors, having been made long prior to the deed of *Mrs. Davis* to him.

For the position, that trusts descend, as other estates, to the heirs-at-law of the trustee, *vide Cruise Title Trust, ch. 2, vol. 1, pp. 484, 485, in margin. Lewin on Trusts, ch. 14, p. 242, Lon. edition*, 1837.

Naked trusts, or when the trustee is seized without being entitled to any beneficial interest descend as at common law, 1831, *ch.* 310, 311. The appellee, *Charles Calvert*, is neither trustee at common law, or under the act to direct descents. The act of 1785, *ch.* 72, sec. 4, in spirit, if not in letter, clearly embraces the case now submitted, it provides that if any person hath died or shall die, leaving real or personal estate to be sold, and shall not appoint a person *to sell* or *convey* the said property, or if the person appointed, shall neglect, or refuse, or die before the execution of such trust, so that the sale cannot be made for the purposes intended, the Chancellor shall have power, on application of any person interested in the sale of such property, to appoint such trustee for the purpose of selling and conveying such property, and *applying the money arising from the sale* to the purposes intended.

Mrs. Davis, or *Thomas Cramphin*, has died, leaving land to be sold and conveyed, and the proceeds to be applied to certain purposes; *George Calvert* was appointed trustee, and has died before the execution of the trust; the complainant, a purchaser under the trust deed, applied to the Chancellor to appoint a trustee to convey the property and apply the money arising from the sale.

The principle of this act of Assembly, is the long established and well known maxim of equity, that the purchaser shall not pay his money, without obtaining a good title, or in other words, shall not pay the purchase money to one who is incapaple of giving him a full and final discharge. *Atkinson on Titles, p.* 379. *Ogilvie vs. Foljambe*, 3 *Mer.* 53.

When there is a hand appointed to receive, the purchaser is not generally bound to see to the application of the purchase money, but it is always incumbent on him to see that the purchase money is paid to a person authorized to receive it and give him a discharge.

"In equity, the party beneficially entitled to the produce of the estate, that is to say, the *cestui que trust* of the purchase money, and not the trustee, or donee of the power of sale, is considered to be the owner, and on this principle it is, that the purchaser is bound, at the hazard of having his money to pay over again, to pay it to the *cestui que trust*, or see that it comes to his hands, or in other words, to see to its application." *Vide Atkinson on Titles*, p. 597.

By the death of *George Calvert*, the hand appointed to receive and convey and apply the funds, is cut off. A mere stranger, technically speaking, is invested with the legal power to collect the money, but the power to convey, is either "*in gremio legis*, or in third persons, *cestui que trusts*," some of whom are under legal disabilities.

If the purchaser has a right to have all incumbrances paid off, out of the purchase money, he certainly is entitled to the aid of a court of equity (independently of the act of 1785) to transmit the funds to those "beneficially entitled to the produce of the estate." It is assumed, that *Charles Calvert*, ex'r of *George*, is equitably, as well as legally, the hand entitled to receive, and upon full payment to him, the Court of Chancery will then perfect the title. What, if after payment to the defendant, as executor of *George*, the heirs-at-law, legatees and "*cestui que trusts*," should insist that the purchaser was bound to see to the application of the fund? that they have not been properly appropriated? and this court should think with them; the complainant would have parted with his money; the lands would still be liable to the charges imposed on them, and the complainant without redress.

"It hath become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title." 2 *Peere Wm's.* 198. Neither will he be compelled to take an

equitible title, nor will a case be directed to the judges as to title, unless the purchaser be willing it should. *Sugden's Vendors*, 243, *2d American from 5th London Edition.*

This does not extend to estates sold under a decree, for although the legal estate is outstanding, and cannot be immediately got in, yet if the person seized of the estate is a party to the suit, the court will compel the purchaser to accept the title, and decree generally that the legal tenant shall convey, and the purchaser in the meantime hold and enjoy. *Ibidem*, 248.

The complainant here, only seeks to place himself in the position of a purchaser under a decree, by bringing into this court all the "*cestui que trusts*," that they may be required to convey through a trustee, and thus obtain the sanction of this court, to a title which, without it, will not only be doubtful, but worthless.

If a purchaser will not be required to accept an equitable title, he surely will not be compelled to pay the purchase money to one, who cannot give him even that, and be forced afterwards to resort to a Court of Chancery for redress.

This is not a case in which the vendee can be said to have waived any objection to the title, by occupying and improving. The vendor, *George Calvert*, had the right to sell and convey; by his death, the office and estate of the trustee became severed, or devolved on those who were incapable of discharging the office, so as to convey the estates: the vendee waited until the office and estate should be re-united, either by the act of law, through a decree of the court, or by operation of time. The coercion of the defendant, in the meantime, forced the complainant to seek that protection which the heirs of the vendor should have been the foremost to proffer, for it is most unreasonable, if not inequitable, to compel a purchaser to pay for land and give no assurance, but that he may seek it, where he can get it.

The complainant being entitled to an indisputable legal title upon payment of the purchase money, should be indemnified out of the same for all costs and expenses incurred in obtaining it; and he could only obtain this allowance from a court of

equity: if he should be compelled to pay the purchase money before a trustee is appointed with power to convey, he must pay those costs out of his own pocket, or the heirs of the vendor (who was only acting in a fiduciary capacity) must incur the expense.

The injury to the appellant would be irremediable, if he should be compelled first to pay the purchase money to the defendant, *Charles Calvert, ex'r of George*, and afterwards, to seek his title from the heirs-at-law of *George Calvert*.

Sir Edward Sugden, speaking of the rule that a purchaser under a decree is compellable to take an equitable title, well says, "the injustice of it is too glaring." "The decree of a court of equity acts *in personam* and not like a judgment-at-law, *in rem*, and it is possible, that the court may never be able to compel the person seized of the legal estate, to convey to the purchaser." *Sugden on Vendors*, 250, *2d Am. from 5th London Edition*. This difficulty, as far as relates to the conveyance of the title is obviated by the substitution of a trustee, under the act of 1785, but no means exist to enable the court to compel absent defendants to pay the costs to the purchaser, in whose behalf a conveyance is decreed. On the other hand, no injury is sustained by enjoining the payment of the purchase money, until the means of perfecting the title are matured; the property being bound for the amount, as well as the sureties on the bonds given for the purchase money, and the delay being compensated for by the payment of interest; and the interests of the legatees being promoted by placing the fund under the control of the Court of Chancery.

Regarding the trusts of the will of *Thomas Cramphin* as specific liens upon the property sold by the late *George Calvert* as trustee, the purchaser had no alternative, but to seek the protection of the Court of Chancery.

The will and codicils of *Thomas Cramphin*, which are referred to by the deed of *Mrs. E. Davis*, create trusts, devise and bequeath legacies and annuities; all these are expressly charged upon the lands conveyed by *Mrs. Davis* to *Mr. Calvert*, by the terms of the deed before quoted.

If an estate be charged with the payment of annuities or legacies, the annuitants or legatees are to be considered, *pro tanto*, the owners of the estate; and if the purchaser pay over his money to the trustees upon their receipt, without seeing it applied in liquidation of these particular charges, or otherwise seeing that they are satisfied, he will be liable to pay his money over again, to the extent of the unsatisfied charges, in case the trustee should waste or misapply the purchase money. *Atkinson on Titles*, p. 597, *London Edit.* 1833.

The learned Chancellor expressly waived the examination of this view. He says: "It does not appear to me to be material to examine, critically, the provisions of the instruments, for the purpose of ascertaining the nature of this trust. It is sufficient to say, that there can be no doubt of the power of the trustee to sell and convey the trust property; nor can it be doubted, that the trustee making such sale, could sue and recover the purchase money, as could the executor of the trustee, upon a note or bond taken by him to secure its payment."

He did not reflect that the parties before him were not the trustee, and the purchaser, but the executor of the trustee and his heirs, *some of whom were legally incompetent to convey;* nor did he consider, that a power to sell and convey, does not dispense with the obligation on the purchaser to see to the application of the purchase money in limited trusts.

"In all properly drawn deeds or wills creating trusts of this description, there is a clause enabling the trustee to give the purchaser a good receipt, and expressly discharging him from seeing to the application of the purchase money. Wherever there is such a clause, the purchaser is exonerated from all question on the subject." *Atkinson on Titles*, 598, 599. The complainant does not question the executor's power to collect at law, but invokes the injunction of a court of equity, to restrain the abuse of that power, until a power to convey and release the property conveyed from all future liability, can be substituted by a decree of the Court of Chancery.

By T. S. ALEXANDER for the appellee.

First. The appellee's first point is, that the purchaser in this case is not bound to see to the application of his purchase money, and therefore, the *cestui que trusts* are not necessary parties to the suit.

Where the trusts are defined and capable of immediate execution, the purchaser must apply his money properly. Where the trusts are continuing, and the purchaser could not be reasonably expected to look after its application, he may pay the purchase money to the trustee. 3 *Sugd. Vend.* 98, (154.) As where the *cestui que trusts* are infants, 4 *Madd.* 142, *Sowarsby vs. Lacey.* Or where the trust in part was for re-investment or debts to be paid at a future day, 16 *Ves.* 151, *Balfour vs. Willand.* The result of all the cases collected by *Mr. Sugden* appears to be that where there is a hand appointed to receive, and discretion is to be exercised in the appropriation of the fund, or its ultimate application is necessarily postponed to a future day, the purchaser cannot be required to see to the application of his purchase money. In the present case, the trusts as to the proceeds of the realty, are—

1. To pay an annuity to *Caroline Calvert* during her life.

2. To provide for the support of her children during minority.

3. To distribute the proceeds amongst the children as they severally attain their full ages.

Many of those trusts are yet continuing, and may endure for fifteen or twenty years to come. I do not understand the appellant's counsel to contend that the purchaser would have incurred risk by payment of the purchase money to *George Calvert*, the original trustee, in his life-time. The objection is rather, that the death of *George Calvert* has vacated the office of trustee, and there is at present no hand to receive the funds. Now, it will be found by recurring to the will of *Cramphin* and to the deed from *Mrs. Davis*, that the trust is to "*George Calvert*, his heirs, executors and administrators," and on the death of the trustee, if the fund had consisted of lands

exclusively, the office would have devolved on his heirs-at-law, if it had consisted of personal estate, on his executor or administrator. *Willis on Trustees*, 53. 10 *Law Library*, 24.

If it is assumed that the trust fund consisted in part of realty, and in part of personalty, then the heir-at-law became trustee of the realty, and the executor became the trustee of the personalty.

The bonds in question in this suit therefore devolved on *Charles B. Calvert*, as executor of *George*, the original trustee, and the legal estate in the land sold descended to the heirs-at-law, charged with or bound by the agreement between the original trustee and the purchaser.

I admit that in the exercise of its general jurisdiction, a court of equity may consolidate the trusts in the hands of a single trustee,—and that such intervention would be highly expedient, if any part of the lands in trust remained to be sold. But if, as I apprehend is the case, all the lands were disposed of by the original trustee, if the entire trust estate now consists of money and monied securities, the trusts may be as efficiently fulfilled by the executor of *George Calvert* as by a new trustee. And no necessity would exist for the exercise of the powers of this court, unless it may become expedient to ask for a conveyance to the executor, as trustee of the legal title to the lands sold, if the court should be of opinion that such title is now outstanding in the heirs (under the act to direct descents,) of *George Calvert*. The heir at common law has in fact conveyed the title which was supposed to be in him to *Charles B. Calvert*.

I deny that the act of 1785, ch. 72, sec. 4, has any just application, in letter or spirit to this case. The act provides for the execution of a *power* to sell which had, or should become inoperative by the death or inability of the person named to exercise the *power*. It does not extend in *terms* to a devise of *an estate in lands in trust* to be sold. And in practice, the distinction between a grant of a *power* and the *devise of an estate*, has always been recognized and respected: and where the trustee of the estate dies, the invariable practice is to

resort to a suit in equity, according to the usual forms of the court. I conclude, therefore, that on the facts disclosed by this record, *Charles B. Calvert*, as executor of *George Calvert*, is now the trustee of so much of *Cramphin's* estate as consists of personalty, and that payment of the bonds and judgment in question to him, would discharge the purchaser.

Second. My second proposition is, that as the purchaser is in possession, and has been in possession of the premises ever since his purchase thereof, and has shewn no defect in title—he has no equity to stay the payment of his purchase money, under pretence of difficulty in obtaining a conveyance.

The bill assumes that *George Calvert* had a good title; but alleges that his title has now devolved on his heirs-at-law or some other persons, so that the complainant cannot obtain a conveyance without the aid of this court. It does not present the ordinary case of a vendee impeaching the title of his vendor, and therefore asking to be relieved from his purchase; or alleging doubts as to the sufficiency of title, and therefore asking it may be sifted before he is compelled to pay the purchase money. The equity alleged is, that the title being good, there should be a decree for a conveyance before the purchaser is required to pay for the purchase.

Now I agree, that as between vendor and vendee, in the common case of a sale for a gross sum, the obligations to pay the purchase money and to make a conveyance, are so far dependent, that on a bill by vendor, the decree will direct first a conveyance,—and next, that on tender of a conveyance, the vendee shall pay. *Seton on Decrees*, 152 (212.) But on a like principle, where the vendee is the complainant, the decree requires first payment of the purchase money, and next a conveyance. *Ib.* 154 (215.)

Take then the case of an agreement, by which the vendee stipulates to pay the purchase money by annual instalments,—and the vendor, that he will convey on payment of the whole purchase money. Here the reciprocal obligations are *independent* of each other; and even at law, the vendor may recover judgment for the earlier instalments, without tendering a

conveyance, or even averring his readiness to make a conveyance. The judgments recovered in the present instance, are conclusive to show that they were properly entered. Where is then the equity of the vendee to stay execution of a judgment properly rendered, and pursuant to his agreement? He has actual possession of the premises purchased. He admits the title to be unquestionable; and his remedy to enforce a conveyance is adequate, and just such as was contemplated at the time the agreement was entered into. It is not pretended that the assets of the vendor are insufficient to answer any recovery that might be had against the executor in damages; nor that any of the parties in whom the title is vested, have refused to join in a conveyance. The pretexts are, that it is uncertain who ought to be parties to the conveyance, and that the infancy of some of the persons supposed to be necessary parties requires the interposition of this court to make a legal conveyance. Now, I deny that any case is to be found in which it has been adjudged that the infancy of the heirs-at-law of the vendor entitles the vendee to an injunction to stay execution of the executor. Nor could any such decision be made, without a violation of principle. The authority of this court to decree a conveyance by an infant, in specific performance of an agreement by his ancestor, is derived from the acts of 1773, ch. 7, 1778, ch. 22, and 1791, ch. 79. Before those acts there could be no decree requiring an infant, *during infancy*, to make a conveyance. Hence, if the vendee in *England* could found an equity on the circumstance of the death of the vendor leaving infant heirs, he would be entitled to stay execution of the executor, until the heirs have attained their full age. And even in *Maryland*, at this day, as the decree is conditional merely, and the infant heir is allowed a day after his arrival at full age, to show cause against the decree, the vendee might (if entitled to an injunction at all,) fairly argue that the injunction, once granted, should continue, until lapse of time had rendered the decree absolute and unimpeachable. Now, I insist, these are necessary and inevitable conclusions, from the hypothesis, that the death of the vendor gives the vendee

any equity against the execution of the executor. And I submit as the settled and more reasonable and convenient practice, that where the title is admitted, and the remedy of the vendee for a conveyance is clear and adequate, he shall not have an injunction against the vendor—nor against the executor of the vendor, on the ground merely of a personal disability on the part of an heir-at-law, which may be removed by the exercise of the ordinary jurisdiction of this court.

If complainant recently after the death of *George Calvert*, had filed his bill for a specific execution, he could not, at that early day, have stayed the action at law of the executor against him. But conceding the right to equitable interposition once existed, it has been lost by the laches of complainant for ten years since the death of the vendor, and for seven years since the recovery of the original judgments. It cannot be that the vendee, with notice of defects in title, or difficulty as to conveyance, shall be permitted to enjoy possession quietly until the patience of the vendor is exhausted, and then ask that execution shall be stayed, because of doubts or obscurities which diligence on his part would have removed. In *Sugden Vend.* (*last edition*,) 2*d* vol. 8, (12,) the cases are collected for the purpose of showing that a purchaser, by taking and silently retaining possession, waives his right to object to the title. *A fortiori* shall delay, and acquiescence in a case where the title is satisfactory, be treated as a waiver of the right to object,—that the vendor, or his representative, is not in a condition presently to give a valid conveyance. It is the duty of the vendee to prepare the conveyance, and thereby to indicate the parties who are to unite therein; and for this purpose, he may call on the vendor for an abstract. But the vendor cannot be in default in relation to the abstract, until an abstract has been demanded. Nor is he bound to take any proceedings in relation to the conveyance, until the draft has been tendered to him. If then, the vendee for seven years after the recovery of the judgment by the vendor, delays his application for an abstract and the tender of a draft of conveyance, is there any harshness in holding that he has thereby waived his right to

object, that difficulties exist in regard to the conveyance which promptitude on his part might have obviated? *Vide* 6 *H. & J.* 529, *Williams vs. Mayor, &c.*

Third. For the preceding reasons, it is respectfully submitted that the injunction ought to be dissolved. It may be material however, in view of the ultimate disposition of the case, that we should now consider the question raised by the bill, *i. e.* where is the legal title to the land claimed by the complainant? The deed from *Mrs. Davis* to *George Calvert*, vested the title in the latter, and her heirs cannot be necessary parties to the suit. It is conceded that the $30,000 secured to her has been satisfied.

The question then is, did the legal title descend to all the children of *George Calvert*, being his heirs by the act to direct descents? Or to his eldest son and heir by the course of the common law? which involves the construction of the act of 1831, ch. 311, sec. 11.

The object of this act was to prevent the inconvenience which cannot fail to ensue, from allowing trust estates to descend to the heirs by the statute, of the trustee; and to accomplish the object fully, to obviate the evil altogether, the act must extend to all trusts which vest the estate in *one* person, to be taken care of, managed, and applied for the benefit of *others*. And we accordingly find it is made by its letter, to embrace every case where the trustee "shall be seized of the naked legal estate, without having or being entitled to any beneficial interest or estate in the lands," &c. The *naked legal estate* is put in opposition to *a beneficial interest*. So that if the trustee does not take any beneficial interest in the trust—if he is not one of the beneficiaries designed to be provided for, he takes in the view of this act the naked legal estate. And this view is consistent with all the cases. A right to enter upon the trust estate—to take the rents and profits—to sell the principal estate—to apply the proceeds in payment of debts and legacies—all these are powers incident to the *legal title* or estate, as contra-distinguished from the *beneficial use*. And it may therefore safely be assumed, that the act embraces every

case where the beneficial interest would not by the preceding laws have devolved in entirety, or in part, on the heirs of the trustee for their own sakes, in case another person than their ancestor had been the trustee.

Upon this construction, the act embraces the present case, so far as it is dependent on the deed, the will and first codicil; for the trusts of the will and first codicil respect simply the interests of others than the trustee. The last codicil provides, that if the trusts created by the preceding instruments fail of effect, then the estate shall vest beneficially in the trustee. But the trusts of the will and first codicil are capable of execution. It is not alleged in the bill that they are void; nor can any unfavorable presumption be made on the present state of the record. It will be observed, that the provision for the trustee is not residuary—is not to take effect after previous limitations shall have been exhausted: but is a substituted interest, to take effect in case only the preceding limitations shall be declared to be illegal. If, therefore, those previous limitations of the trust did ever take effect, the ulterior limitation in favor of the trustee is disappointed.

I conclude, then, that the legal title to the land sold to complainant, has devolved on *George H. Calvert*, the eldest son and heir, according to the course of the common law, of the trustee *He has conveyed all his interest to Charles B. Calvert, who is therefore on my hypothesis able to convey a good title to complainant.*

By Bowie in reply.

All the authorities concur in requiring the purchaser to see to the application of the purchase money, where the trusts are specific charges on the land, and it is no where said, that the creation of trusts which invest discretionary powers in the trustee, or the execution of which are postponed to a future day, by the same deed or instrument, which established the specific trusts, releases the purchaser from the obligation of seeing to the discharge of those which are specific. In other words, a man is not discharged from what is reasonable and

possible, because it is unreasonable to expect him to do what is impossible.

The appellee admits, "the purchaser must apply his money properly" "where the trusts are defined and capable of immediate execution."

A large portion of the trusts declared by the will and codicils of *Mr. Cramphin*, and revived and re-published by the deed of *Mrs. Davis*, are of this kind, viz: annuity to *Caroline Calvert* for life;—pecuniary bequests to *Richard Williams*, *Ann Williams*, *Elizabeth Williams* and several others, whose names are not recollected;—such charges, as the books expressly enumerate, as those which the purchaser must see extinguished. *Vide Atk. on Tit.* 597, as before cited.

The appellant designed to insist, that the law imposed this duty upon the purchaser, if the original trustee, *George Calvert*, had lived, and the hand appointed to receive the trust funds had not been cut off by death: a duty rendered more imperative, since the office of trustee became vacant, or devolved upon those, some of whom were incapable of discharging the trusts. To avoid this objection, the appellee asserts, that the deed of *Mrs. Davis* confers the trust on "*George Calvert*, (his heirs, executors and administrators,") and on the death of the trustee, the office of trustee as to the real estate, (as far as it was undisposed of,) devolved on his heirs-at-law, and as to the real, converted by sale into personal estate, upon his executor, for which he cites *Willis on Trustees*, *p.* 53.

Willis lays down the general proposition, that trusts, "when of real estate, devolve by the death of the trustee, on his heir-at-law;" "when of personalty, they vest in his executor or administrator." He does not say that the execution of a trust to sell and convey real estate, in part performed by the original trustee, is to be consummated by his executor, or that where the original trustee has sold the real estate, the trust becomes personalty, and devolves upon the executor or administrator. The trust follows the legal estate of the property conveyed in trust; if the legal estate descends on the heir-

at-law, the trust follows necessarily, "*accessorium sequitur principale*," and with this all the authorities agree; otherwise, on the death of every trustee of realty, who is charged to sell and convey, and apply the proceeds, the office would be divided—the legal estate descending to the heirs, and the control of the proceeds, on the personal representative. The latter represents the individual, not the trust, and though the legal control of the proceeds should devolve on him, as far as their collection is concerned, their subsequent application belongs to the heir-at-law, privy in estate.

The learned solicitor for the appellee denies the application of the act of 1785, ch. 72, sec. 4, to this case, upon the ground that "it provides for the execution of a *power* to sell, which had, or should become inoperative, by the death or inability of the person named to exercise the power." It does not extend in *terms* to a "*devise of an estate in lands, in trust to be sold;*" "and in practice, the distinction between a grant of a power and the devise of an estate in trust, has always been recognized and respected."

The appellant did not contend that this case was embraced in terms, but in its spirit, if not in letter: "*qui hæret in litera, hæret in cortice.*"

"It has always been considered that a devise to trustees and their heirs, upon trust in a given event to sell, or do any other act which may require the inheritance, vests the legal fee in the trustees," and they cannot, upon the construction of any subsequent devise, be held to take merely a power, for that would defeat the express devise to them. *Sug. on Powers*, 105, cited in *Fletcher on Trustees, p.* 62, *note* (*a.*) *Sug. on Powers, p.* 127, *6th London Edit.*

The act of 1785, ch. 72, sec. 4, enacts, "if any person hath died, or shall die, leaving real or personal estate to be sold for payment of debts, or *other purposes*, and shall not by will or other instrument in writing, appoint a person or persons to sell or convey the same property; or *if the person or persons appointed* for the purpose aforesaid, shall neglect or refuse to execute such trust, or *shall die before the execution of such*

trust," in every such case, the Chancellor may and shall have authority, &c.

Does not this clause expressly embrace the case of "a devise of an estate in lands in trust to be sold," if not "in *totidem verbis*," yet in equivalent terms? *Sugden* says, "the devise upon trust, in a given event, to sell or do any other act which may require the inheritance," "vests the legal fee in the trustee." Is there any difference between the investiture of a legal fee in a trustee, by implication, *by devise of a power to sell*, and "a devise of an estate in lands in trust to be sold?" if there is, it is merely a verbal distinction. But the appellant insists, the act of Assembly clearly embraces both the devise of a power to sell, and "the devise of estate in lands in trust to be sold," with the view of avoiding the inconveniences and injustice, which the facts of this case demonstrate must result if a different construction prevailed.

The appellant conceives that he has already anticipated and sufficiently answered the second proposition of the appellee, viz: that the possession of the purchaser, and his long acquiescence precludes him from all equity, "to stay the payment of the purchase money, under pretence of difficulty in obtaining a conveyance."

The appellant hath shown that the original trustee had the power to sell and convey when the appellant purchased, and took possession; that his continued possession was in reliance upon the ultimate competency of the trustees' heirs-at-law, to give him a good title; and he had no reason to doubt their intention to give him such a title, until one of them, in his character as executor, sought to enforce the payment of the purchase money, before qualifying himself to give the appellant an equivalent for it.

The appellee asserts, "the bill assumes that *George Calvert* had a good title;" the bill alleges, that *George Calvert* had power *to sell and convey*,—but still it charges, that the trusts were such, that notwithstanding the power to sell and convey, the "purchaser could not have safely paid the purchase money to him, without seeing to the application of the purchase

money." This is not a case of defective title merely, but a case where the title being vested in part in minors, *the lands to be conveyed are subject to incumbrances, which can only be removed by the aid of a Court of Chancery.*

The appellee admits, that as between vendor and vendee, in the common case of a sale for a gross sum, the obligation to pay the purchase money, is dependent on the ability to convey, and "on a bill by vendor, the decree will direct first, a conveyance, and next, on tender of a conveyance, the vendee shall pay. But where vendee is complainant, *vice versa.*" The principle of these decisions is not the relative position of the parties, complainant and respondent, but the common rule of equity and justice, that each shall give a "*quid pro quo,*" if either should come into court, alleging that the land sold was covered by incumbrances of larger or smaller amount, the decree would not be in the first instance, that on a tender of conveyance, the vendee should pay,—or in the second, on payment of the purchase money, the vendor should convey; but that the incumbrances be discharged out of the purchase money, and the case referred to a master, to ascertain what incumbrances existed.

Here the personal representative of the vendor seeks to enforce the payment of the purchase money, without either offering a conveyance, or guaranteeing against incumbrances. It is objected by the appellee, that no case can be adduced in which the minority of the heir of the vendor has been regarded as a sufficient ground for enjoining the payment of the purchase money; that until the acts of 1773, ch. 7; 1778, ch. 22; 1791, ch. 79, there was no authority in this State for a decree requiring an infant during infancy to convey, and if in *England*, "the vendee could found an equity on the circumstance of the death of the vendor leaving infant heirs, he would be entitled to stay execution of the executor, until the heirs have attained their full age."

The appellant does not find it necessary to controvert this position, because he does not seek the intervention of the Court of Chancery, upon *the sole ground* of the minority of

the vendor's heirs, but he assigns this as one of the reasons why the incumbrances charged on the land cannot be removed by them. To show, however, the effect of infancy upon the disposition of the purchase money in *England*, he quotes the following from *Chitty's Equity Dig. Tit. Inf'ts, p.* 541: "The vendor dying intestate, and leaving an infant heir, the purchase money being paid into court, in a suit for a specific performance instituted after his death, *will be retained until the heir attains twenty-one, and conveys.*" *Bullock vs. Bullock*, 1 *Jacob & Walker's Rep's*, 603.

The executor of the vendor is not permitted to handle the purchase money, however abundant the assets, or inexhaustible his resources; the money is held in pledge, until the heir attains twenty-one, and conveys.

Should there be less security given to purchasers in *Maryland?*

The executor of the vendor as such, has no right to the money he seeks to enforce from the appellant; it constitutes a fund specially dedicated to specific purposes, and until the trust, of which this money is a part, is executed by a legally constituted trustee, competent to release and discharge all paying to him, and to give a "*quid pro quo*," for what he receives, the money or securities for it, should remain in the custody of the law. The last additional point presented by the appellee is, "that the legal title to the land sold to complainant has devolved on *George H. Calvert*, the eldest son and heir," who has conveyed to the appellee all his interest, and therefore, *the appellee is able to convey a good title to complainant.*

The act of 1831, ch. 311, sec. 11, is referred to as that which conferred the legal estate in the lands in question upon *George H. Calvert*, the eldest son and heir-at-law of *George Calvert*, the original trustee.

The act as quoted by the appellee, embraces only trustees "who shall be seized of the naked legal estate therein, without having or being entitled to any beneficial interest or estate whatsoever in said lands," &c. The deed of *Mrs. Davis*

makes *George Calvert* a *beneficiary*, by first authorizing him to reimburse himself out of the estate, for all costs, charges and expenses, incurred in the contestation of said will and codicils of said *Cramphin*, (and the sum of $30,000 paid to the grantor, if the appellant is not mistaken.) The right to reimburse himself the costs, charges and expenses, clearly constituted something more than a naked legal estate in the trustee, and independently of the codicil of *Mr. Cramphin*, which declares *George Calvert* the devisee of his estate, in the event of the legal incapacity of the other legatees, must exclude this trust from the operation of the act referred to.

Such being the case, the legal estate would descend, pursuant to our act to direct descents, upon the children and descendants of the original trustee generally.

If, however, the act of 1831, ch. 311, sec. 11, should be held to include the present trust estate, it does not impair the complainant's right to insist, that the purchase money shall be applied under the decree of the court, to the specific purposes to which it was appropriated, and that the appellee be in the mean time enjoined from enforcing its collection.

The power to sell and convey does not dispense with the obligation on the purchaser to see to the application of the purchase money. *Vide Atk. on Titles, London Edit.* 598, 599.

Frick, J. delivered the opinion of this court.

The bill charges that *Thomas Cramphin*, of *Montgomery* County, deceased, devised to *George Calvert* and his heirs, his real estate, to be sold and applied to certain purposes, expressed in his will. That *Elizabeth Davis*, who claimed as heir-at-law of *Cramphin*, and had successfully contested the validity of the will and its codicils, afterwards compromised the dispute by conveying to *Calvert*, all her interest in the estate, in trust to provide, in the first instance, for the payment of a large sum of money to herself; and then in further trust, for the purposes expressed in *Cramphin's* will. The terms creating this trust are, "in trust to hold, apply and appropriate the estates hereby granted, or in case of the sale of them,

or any part of them, the said proceeds, to and for the same uses, trusts, purposes and objects as are expressed and declared in the said instruments of writing, purporting to be the last will and testament, and codicils thereto, of the said *Thomas Cramphin.*"

In the month of August, 1837, the appellant purchased from *Calvert*, a part of the land thus conveyed to him for the sum of $2,852, for which he executed to *Calvert*, his four several single bills, payable in equal instalments in one, two, three and four years from the date. *Calvert* afterwards died, and his executor, *Charles B. Calvert*, instituted suits at law on *three* of the single bills, which had become due, and recovered judgment against the appellant at March term, 1841, in *Montgomery* County Court, which judgment was afterwards at November term, 1846, revived, and *fi. fa.* issued thereon. In the mean time, the fourth and last instalment of the purchase money had become due.

This bill is hereupon filed, invoking all the heirs of *George Calvert*, and all the *cestui que trusts* under the will of *Cramphin*, (many of whom are minors,) as defendants praying that the executor may be enjoined, until a trustee shall be appointed by the court, to receive and apply the whole purchase money, which he is willing to pay whenever there is a person in being competent to convey the land, so sold by *George Calvert*, in his life-time, to the appellant.

The answer of *Charles B. Calvert*, the executor, admits the purchase made by the appellant upon the terms mentioned in the bill, and the recovery of the judgment on the three instalments of the purchase money. It insists that the title to the land, which is unquestionable, is now vested in the heirs-at-law of *George Calvert*, and that the appellant has had sufficient time to obtain from them a conveyance by the proper proceeding in equity.

The injunction which, in the first instance, was issued on the filing of the bill, upon coming in of the answer, was by order of the Chancellor, dissolved,—and from this order, the present appeal is taken.

In support of the appeal, the appellant contends, that the title in question was suspended by the death of *George Calvert*, the trustee, or vested in persons incapable of making the conveyance; and that the property being subject to limited trusts, which required the purchaser to look to the application of the purchase money, there was no hand in being to receive, and to which he could safely pay, without the intervention and appointment of a trustee by a Court of Chancery.

It has long been a general rule of Chancery practice, that the purchaser shall not be required to pay his money to one who is not competent to give him a good title to the purchase. Where, however, there is such person competent or appointed to receive it, and give a discharge, the purchaser is not generally required to see to the application of the money.

"The right to a good title is a right, not growing out of the agreement between the parties, but given by the law; that as the purchaser parts with good money, the vendor shall give an estate with a clear title." *Atkinson on Tit.* 379. *25 Law Library*, 168.

Is there in the case before us such a person competent to convey, and to give the discharge for the purchase money? It is affirmed in one view taken by the appellee's counsel, that the legal estate in the lands descended to the heirs-at-law bound by this agreement between the purchaser and the original trustee, while the bonds in question devolved upon the appellee as executor,—and being at his death, converted into personal estate by force of the trust to "*George Calvert*, his heirs, executors and administrators," the office of this trust devolved upon his executor.

In support of this proposition, *Willis on Trustees, page 56*, is cited. The doctrine in *Willis* is thus stated: "trusts, when of real estate, devolve by the death of the trustee on his heir-at-law; when of personalty, they vest in his executor or administrator;" and this, of course, in the latter clause, is true, where the trust consists of personal estate. But it is neither said or meant, that where the trust is originally of real estate, and in part executed by sale from the original trustee,

that the trust can become personalty, and be consummated by the executor. All the authorities agree, that when the legal estate descends to the heirs-at-law, the trust is transmitted with it. For if otherwise, on the death of every trustee charged with the sale of real estate, the functions of the trust, by a sale in his life-time, would fall into separate hands; the purchase money passing into the hands of the personal representatives, not as assets, but as a trust fund, while the title descends to the heirs-at-law.

At common law, on the decease of the trustee, the estate will descend to the heir. *Lewin on Trusts*, (242.) 24 *Law Lib.* 123. Trusts descend to the heir of the person who was last entitled to them, in the same manner as legal estates. *Cruise*, 1 *vol.* (485.)

The trust thus devolving upon the heirs-at-law of *George Calvert*, some of whom are minors, can the purchaser under this trust, safely resort to the usual mode of obtaining his conveyance, without seeing at the same time, that they are capable of giving him a full discharge? Is the law so clear, and the course of the appellant so safe, that he may pay his money without the concurrence of those beneficially interested? If these trusts are a charge upon the land purchased, is he not bound to see it satisfied? The will and codicils of *Thomas Cramphin*, which are revived by the terms of the deed from *Mrs. Davis*, create trusts by way of annuities and pecuniary bequests to the parties there named, which are expressly charged upon the lands conveyed by her to *Calvert*, and would seem to be precisely such charges as the purchaser is to see extinguished. When the trusts are general, as for the payment of debts generally, no such obligation exists. 3 *Sugden*, 97, (152.) But if for the payment of legacies or debts, which are scheduled or specified, the trust being defined and limited, equity holds it reasonable, that the purchaser should see to the application of the money. *Ibid*, 98.

In equity, the party beneficially entitled to the produce of the estate—that is to say, the *cestui que trusts* of the purchase money, and not the trustee or donee of the power of sale, is

considered to be the owner: and on this principle, it is that the purchaser is bound, at the hazard of having his money to pay over again, to pay it to the *cestui que trusts*, or see that it comes to his hands; or in other words, to see to its application. *Atkinson*, 597.

And the only cases in which it would appear safe, that the purchaser shall not look to the application of his money, is where the trusts are undefined and general in their nature; unless the trustee, by the terms of the deed itself, is authorized to give a receipt, and discharge the purchaser from seeing to its application. Without such authority or clause in the deed, where the trust is specific and limited, the rule is uncontroverted, that the purchaser must see his money properly applied. *See Atkinson*, 598—600. Many of the trusts in the will of *Cramphin*, are of this character. An annuity to *Caroline Calvert* for life;—pecuniary legacies to *Richard*, *Ann* and *Elizabeth Williams*, and others. And whatever may be the general nature and character of the other provisions and trusts in the will, these are sufficient to warn the purchaser to look for the proper party, on whom the execution of them devolves by the death of the original trustee. Is it not precisely the case where recourse must be had to the Court of Chancery, to see that a competent hand is appointed to receive the fund, and discharge the specific and ulterior provisions of this trust?

Suppose that *George Calvert* had died before this sale to the appellant. The legal estate here descends to all his heirs. Could the execution of this trust, by operation of law, attach to all the heirs named in this bill, infants and others? If they take in the same character, as the original trustee, is such a trust susceptible of execution by all the heirs? or is not the interposition of a court of equity, indispensable to carry out its provisions, by the hands of some person competent to convey title and discharge the trusts?

And certainly such interposition is the more necessary now, *when after the sale*, it is sought to direct the whole fund into the hands of the executor, as competent to discharge this extended trust, while every separate purchaser is required to

resort to the circuitous process in equity, against all the heirs of the trustee to secure their title.

The appellant has, in our opinion, adopted the safe and the true course. He seeks by his bill, to place himself in the condition of a purchaser, under the decree of a Court of Chancery; and by bringing the *cestui que trusts* into court, most of whom are incompetent to convey, to obtain his title by the intervention of a trustee of that court. If he could be compelled to pay the purchase money to the executor, and then seek his title against the heirs, while it was doubtful, under the circumstances of the trust, whether they were the proper parties to convey, it would be a case of severe injustice and hardship. He ought not to be required to incur the costs of such proceeding against absent defendants and infants, for which he may never be reimbursed, and the very question at issue is whether they are competent to convey. It has been argued, and is one of the points made by the counsel of the appellee, that the title in this case devolved on *George H. Calvert*, the eldest son and heir-at-law, under the act of 1831, in conformity with the doctrine of the common law, in relation to trust; and that *George H. Calvert*, having conveyed all his interest to the appellee, he is the competent and proper party to convey the title to the appellant.

We shall hereafter shew that the act of 1831, does not reach this case. And yet this is one of the alternatives of title, which the appellee offers, while the other is represented to be in the heirs, conformable to the act of descents. If the title is not, strictly speaking, doubtful, it is, at least, admitted, that it was questionable, on whom it devolved at the death of the original trustee. And was the vendee, in such case, to make the selection, at his own hazard; first to pay his money and then to grope through these multiplied trusts in search of his title? This was not his affair, and he was therefore right, in withholding the payment, until the beneficiaries under the trusts, presented the hand indisputably entitled to receive it. And when attempted to be enforced at law, it was his only resource, to seek his present remedy and protection in Chan-

cery. The bill does not impeach the title of his vendor, but alleges that it has devolved on his heirs-at-law, *or some other person*, so that he cannot obtain a conveyance, without the aid of the court. He avers his willingness to pay the purchase money, as soon as the hand is in being to receive it; and in the opinion of this court, has made out a good case for the interposition of the Chancellor.

This view of the case is a sufficient answer to the further objection, that the appellant, by his own delay, has waived his right to object, that being in possession of the premises, ever since his purchase, he has no equity now to stay the payment, on pretence of difficulty in obtaining a conveyance, and that whatever right to equitable interposition may once have existed, he has forfeited by his own negligence. If by the death of *George Calvert*, the trust devolved upon those who were incapable to perform its functions, he is not required to proceed, at his risk and cost, to unite the office and estate in another trustee competent to execute the trusts and convey the estate. Upon payment of his purchase money, he was entitled to an indisputable legal title. The heir at common law, who it is said takes the estate and the trust under the act of 1831, conveyed the title supposed to be in him, to *Charles B. Calvert*, the executor and appellee. Suppose the appellant to have paid either, and taken his conveyance, would it not be just matter of complaint that he should, at his own cost, afterwards be turned over to perfect his title, from the heirs-at-law, or the *cestui que trusts?* When his resort was not clear and adequate he could only fortify himself, by withholding the purchase money, more especially, where it became his duty to secure its proper application. In this respect the delay is not *Duffy's*, for if he had been ready to pay the whole purchase money, there was none competent to give him a discharge. In satisfying the bonds he had no assurance that the money would not be applied by the executors as assets of the estate of *George Calvert*. In procrastinating the payment and holding out against the judgment of the executor, he might, without presuming too far, have supposed proceedings to have been instituted at the

same time, to supply the place of the original trustee. The heirs of *Calvert* were themselves ulterior beneficiaries under the will of *Cramphin*, and they and the legatees, might well be supposed to have applied at the proper *forum* to revive the hand required to execute these trusts. The laches therefore have not been entirely on the side of the appellant. Nor has any serious injury resulted to the parties in interest, by delaying until the means of perfecting the title should be matured by them, because, as is properly said by the appellant's counsel, the property being bound for the amount, as well as the sureties on the bonds given for the purchase money, the delay is compensated by the payment of interest.

The act of 1831, ch. 311, sec. 11, has been referred to as conferring upon *George Calvert*, the eldest son and heir-at-law, the legal estate in the lands in question; thus disposing of the whole subject before the court, and relieving all difficulty between the parties, by furnishing the proper hand to execute the conveyance and receive the purchase money.

Naked trusts, when the trustee has the legal title without any beneficial interest in the trust under this act of 1831, are made to descend as at common law. The words of the act are, "trustees who shall be seized of the naked legal estate therein, without having, or being entitled to any beneficial interest or estate whatsoever in the lands." Is not *George Calvert*, in every sense, a beneficiary under the deed of *Mrs. Davis*?

He is first to reimburse himself out of the estate, the costs, charges, and expenses incurred by him in contesting the will and codicils of *Cramphin*, and the last codicil of the will provides, that if the previous trusts created by the instrument fail to take effect, then the estate is to devolve upon *George Calvert* as devisee. The right to reimburse himself, the heavy costs and charges incurred in the attempt to sustain the will of *Cramphin* out of the very trust in his hands, must clearly bring this case within the exception of the act of 1831.

But when the ulterior limitation in her favor, which confers upon him the whole estate, upon the possibility that the other trusts may fail, is superadded, it is clearly such a beneficial

interest, as seems to have been expressly in view, and must exclude this trust from the operation of the act referred to. This being the case, the trust estates have here descended to the heirs of the trustee by the act to direct descents. Some of these heirs, as infants, are legally incompetent to convey, and even if the aid of a court of equity was invoked for this purpose, the title obtained by such proceeding, would not discharge the purchaser from looking to the application of the purchase money. In this view of the case, the *cestui que trusts* are necessary parties to any proceeding, which looks to a conveyance to the appellant. Any attempt to enforce the payment of the purchase money, without such assurance of title, was properly met by the appellant, in bringing before the court all the parties in interest and estate, united, seeking to enjoin them, until a trustee should be substituted for the original trustee, to receive and apply the purchase money, and convey the lands sold to the purchaser. If this application had been made by the appellant upon the three instalments alone, upon which judgments had passed, and before the last instalment became due, the Chancellor would have been right in dissolving the injunction; because, until the fourth instalment was due, the appellant could have no claim to a conveyance of the lands. But the whole purchase money having decome due at the filing of the bill, and the appellant being willing to pay, upon receiving such discharge and conveyance as he is entitled to, it becomes necessary that time should be allowed, and the proper steps be taken to bring in the parties to the bill.

The order of the Chancellor is, therefore, reversed, and the injunction continued in force. And that such proceedings may be there had, as are in conformity with the principles expressed in this decision, the cause is remanded to the Court of Chancery.

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1. *A.* devised the dividends in certain bank stock to his widow for life, with remainder to his children, and appointed *D.*, one of his sons, executor. He assented to the bequest, paid the dividends to his mother, and assigned his interest to *J.* Before the assignment, *D.* was indebted to the bank. The stock remained in the name of the testator, after the widow's death. The assignee, *J.*, applied to the bank to permit *D.* to transfer the stock assigned to him. The debt of *D.* not being paid, the bank refused. *Held*, that as by the charter of this bank, all debts actually due to it by a stockholder offering to transfer, must be discharged before such transfer be made, the bank was not obliged in

ASSIGNMENT, ASSIGNOR AND ASSIGNEE—*Continued.*

this case to permit the transfer. *Farmers Bank of Maryland vs. Iglehart*, 50.

2. The assignee of *D.* was precisely in the predicament of his assignor, under whom he claimed as legatee. *Ib.*
3. Dealing with a stockholder of a bank, with reference to its stock, a purchaser takes an equitable assignment, subject to the rights of the bank under its charter, of which the assignee is bound to take notice. *Ib.*
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ASSUMPSIT.

1. A party cannot recover money, voluntarily paid, with a full knowledge of all the facts, although no obligation to make such payment existed. *Baltimore & Susquehanna R. R. Co. vs. Faunce & Passmore*, 68.
2. A party making a payment in the mistaken belief, that the sum paid was the true balance appearing due from an account before him, and not noticing a deduction therefrom, paid a larger sum than he intended, may recover the excess. *Ib.*
3. A payment cannot well be said to be voluntary when it is made in consequence alone of a false view of the facts. *Ib.*
4. The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights. *Ib.*
5. Where the agent of a rail-road company agreed to pay only what the engineer of the company certified, and supposed he was paying no more, while in fact he did pay more to a contractor, the company may recover the sum erroneously paid. *Ib.*
6. In an action for money had and received, any thing received by the defendant as money, will entitle the plaintiff to recover; as a bond, a note, a credit in account, land received and acknowledged as money, and a mixed, erroneous, payment of legal and illegal notes—there being circumstances to show that the defendant received money for the illegal notes. *Ib.*
7. Where the defendant's claim was $2,486 10, and his agent intending to pay that sum, erroneously and unconsciously paid $3,306 10, which payment was made up of $1,006 in small notes illegally issued by the plaintiff, and $2,300 10 in current money, the defendant received the whole as money, and upon immediate demand, refused to return the small notes, or the over payment. In an action for money had and received, the plaintiff may show the error; the defendant cannot defend himself upon the ground that the small notes were illegally issued. *Ib.*
8. The Board of Directors of the *Baltimore and Ohio Rail-road Company* having applied $146,816 of the net revenue of the Company for the year 1846, to the re-construction of the road between *Harper's Ferry and Baltimore*, and for machinery and other purposes, leaving a cash

ASSUMPSIT—*Continued.*

balance of only $90,504, and designing to reimburse the stockholders for the amount so applied, in November, 1846, declared a dividend of three dollars per share, payable on and after the 20th of that month, as follows: to all stockholders of less than fifty shares, cash; to all of fifty shares and over, one dollar per share in cash, and two dollars per share in the Company's bonds, bearing interest, payable quarterly, and redeemable in twenty years, and deliverable to the stockholders at the office of the Company. The State being a stockholder to the amount of five thousand shares, refused to receive the dividend as declared by the Company, and instituted an action of *assumpsit*, to recover the amount of *three per cent.* in money. *Held*,

That the State was not bound to receive these bonds, (though if accepted, they would have been valid in her hands,) but might treat the dividend, so far as it proposed their delivery, as illegal,—and she has a remedy commensurate with the injury thereby sustained, but not in the form of an action of general *indebitatus assumpsit*. *The State vs. Balt. & Ohio R. R. Co.*, 363.

9. By instituting this form of action, the State affirmed the dividend, and must take it as it is. Hence, she cannot recover the $15,000 in this suit, because the dividend declared did not profess to be a dividend to that extent in money. *Ib.*

10. The relation of trustee and *cestui que trust* exists in a qualified sense, as between the directors and the stockholders, and the funds in the hands of the former in which the latter have an interest, cannot be sued for in this form of action, unless a dividend has been declared. *Ib.*

11. There can be no recovery in this case of the $5,000, which was the amount of the cash dividend payable to the State, there having been no demand for payment thereof, either of the Company, or its authorized agents; such previous demand being clearly necessary to maintain this suit. *Ib.*

12. The defendant, with others, signed an instrument of writing, promising to pay the *President and Managers of the S. and G. S. Rail-road Co.* the sum of $50 for every share of stock set opposite to their respective names, in such manner, &c. as should be determined by the said *P. and M.*, pursuant to an act of the General Assembly of *Pennsylvania*. A verdict was taken for the plaintiff for the value of shares subscribed for by the defendant, subject to the opinion of the Court, upon a statement of facts, with an agreement that the court might make such inferences from the facts, as a jury might. At the time of the subscription it was admitted by the statement, that the committee, who obtained it, represented to the defendant that *T. W. Canal stock* would be taken at par for any subscriptions to the *Rail-road Co.* The defendants resided in *Maryland*, and were ready to pay in Canal stock. *Held*, that an action for money had and received could not be maintained. *Swatara R. R. Co. vs. Brune*, 41.

13. A plaintiff cannot recover in *assumpsit* against his own representation,

ASSUMPSIT—*Continued.*

upon a promise, the inducement to make which was founded upon such representation. *Ib.*

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Our attachment laws do not expressly authorize a claimant of property to appear to an attachment; yet claimants are permitted to interpose their claim against a judgment of condemnation. *Carson vs. White*, 17.

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See CORPORATIONS.

BANKS.

1. *A.* devised the dividends in certain bank stock to his widow for life, with remainder to his children, and appointed *D.* one of his sons, executor. He assented to the bequest, paid the dividends to his mother, and assigned his interest to *J.* Before the assignment, *D.* was indebted to the bank. The stock remained in the name of the testator, after the widow's death. The assignee, *J.*, applied to the bank to permit *D.* to transfer the stock assigned to him. The debt of *D.* not being paid, the bank refused. *Held*, that as by the charter of this bank, all debts actually due to it by a stockholder offering to transfer, must be discharged before such transfer be made, the bank was not obliged in this case to permit the transfer. *Farmers Bank of Maryland vs. Iglehart*, 50.
2. Dealing with a stockholder of a bank, with reference to its stock, a purchaser takes an equitable assignment, subject to the rights of the bank under its charter, of which the assignee is bound to take notice. *Ib.*
3. That this was a case in which the legal title to the stock, which otherwise would have been in the executor, had become extinguished by his consent to the legacy, and vested in the legatee, *D.*, and where the assignee claimed not of the executor, but of the legatee. *Ib.*
4. Where the debt due a bank, which, by its charter, is not bound to permit a transfer of its debtor's stock, until his debts are paid, is barred by limitations at law, it does not lose its lien on the stock. The debt is not extinguished, though its remedy may be barred, and the lien follows the debt. *Ib.*

BANKS—*Continued.*

5. If the debt were extinguished, the lien would be lost. *Ib.*

See CORPORATIONS.

TAXES.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *C.* drew a bill of exchange on *B.* payable ninety days after date, endorsed by *W.* in blank. It was negotiated with *P.* who endorsed it specially to *D.* On presentation for acceptance, it was refused, protested, and returned by *D.* to *P.* when the latter erased his special endorsement, and re-transmitted the bill to *D.* who sued *W.* upon his endorsement. The defendant, in support of his defence, had proved by *P.* the erasure of his endorsement; and the plaintiff then proposed to ask him to state the reasons which induced him to strike it out. This the County Court refused to sanction. *Held*, there was no good reason for the refusal, unless it be that the fact of the erasure, as proved by the defendant, could not prejudice the plaintiffs. If it had been of any importance to know why the erasure had been made, it must have been reasonable to permit the witness to state when, why, and under what circumstances, it was made. *Burckmyer & Adams vs. Whiteford*, 1.

2. Upon the return of a bill of exchange, drawn at *Baltimore*, upon a house at *Charleston, S. C.* protested for non-acceptance, which had been endorsed generally by the payee, the holder in *Baltimore* struck out his special endorsement, and by letter transmitted it to the plaintiffs, residents in *Charleston*, and claimed the amount of the bill from them, informing them it had been charged to their account, and he expected a credit for it. *Held*, that in an action by the house at *Charleston*, against the payee and endorser of the bill, this letter, in connection with parol proof in the cause, was evidence to show the right of the plaintiffs to institute the action. *Ib.*

3. In a case where the plaintiff's right to sue upon a bill of exchange was denied, he may prove its delivery to counsel, and the fact of his counsel's possession, for the purpose of the suit, when the action was commenced. *Ib.*

4. When the day on which notice of protest ought to have been given, is Sunday, it is sufficient to serve it on the next day. *Ib.*

5. Where three parties were responsible as sureties upon a promissory note, and upon a difference arising as to the extent of their several liabilities, it was agreed that the note should be renewed—one being maker, and the two others endorsers; the latter endorser being security for the first. The executor of the maker having paid the note, omitted to present his claim to such last endorser until the estate of the *first* endorser, which was amply sufficient to pay his liability, was settled up; and when no recourse could be had against it.—*Held*, that the latter endorser was discharged. *Dorsey vs. Wayman*, 59.

6. The last endorser on a promissory note, who was the security for a prior endorser, does not lose his claim against his immediate principal, by continuing to endorse renewals of the note, which fell due after his principal's death. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

7. *V. & D.* sued *S.*, and declared against him as maker of a note, and upon the common counts. The note was signed by *N. & M.*, payable to the plaintiffs, or order, and across the back of it, *S.* had written his signature in blank. The plaintiffs proved that the signature, *N. & M.*, was written by *S.*, and that he was a partner of that firm. The note was given for a balance due by *N. & M.* to the plaintiffs, upon their request, who had asked for the note endorsed by *S.* The defendant proved that he was not the partner of *N. & M.*, but their agent, and the plaintiffs knew it. The plaintiffs prayed the County Court to instruct the jury, that if they believe that the name of *S.* was written by him on the back of the note at the time it was signed by *N. & M.*, or shortly afterwards—that then the defendant, even if he were not a member of the firm of *N. & M.* is liable in this action, and the plaintiffs entitled to recover, which was granted, and affirmed upon appeal. *Sullivan vs. Violett & Dempsey*, 181.
8. The defendant *S.* then prayed for an instruction, that if the jury should believe that the plaintiffs solicited the note from *N. & M.*, to be endorsed by *S.*, and that he was authorized by *N. & M.* to sign their names to such note, and after writing his own name on the back of said note, to send the same to the plaintiffs; and that *S.* did sign the name of *N. & M.* to said note, and wrote his name on the back of the same as endorser, as requested by the plaintiffs,—that then the jury cannot find for the plaintiffs, as the defendant's liability is not that of a maker of said note. The County Court refused said prayer, which was affirmed upon appeal. *Ib.*
9. Upon the back of the note of *N. & M.*, payable to *V. & D.* or order, *S.* wrote his name generally. *Held*, that he was liable to *V. & D.* as maker. *Ib.*
10. An unaccepted draft, drawn by a *third* party upon a *fourth*, was endorsed by a debtor to his creditor on account of a precedent debt;—acceptance was refused, and notice given to the drawer by the holder—but notice was not given to the debtor endorser for some months after such refusal. In an action by the creditor against the debtor to recover his precedent debt, the defendant cannot defeat the action to the amount of the draft, by insisting that the holder should have sued the drawee, who had funds of the drawer at the time of the presentation of the draft—the drawer being sued by the creditor, who still retained the draft. *Brooks vs. Elgin*, 254.
11. Refusal to accept or pay a draft, established by oral proof, is a question of fact; whether notice of such refusal was given within a reasonable time, is a question of law. *Ib.*
12. Whether an assignee of a draft, delivered and received on account of a precedent debt, has or has not used due diligence in endeavoring to recover the sum assigned to him, from parties on the draft liable to the assignor, is a question of law. *Ib.*

BILL OF REVIVOR.

See LIMITATION OF ACTIONS.

BOND.

See GUARDIAN AND WARD.

CALLS.

See EJECTMENT.

CASES OVERRULED OR EXPLAINED.

1. In *Andrews vs. Scotton*, 2 *Bland*, 643, it was decided, "that if a trustee directed to sell by decree at a public sale, sell, at private sale, the sale will be confirmed, if satisfactory reasons are given for so doing, and *no objection is made.*" These latter words mean *objections of sufficient force*, to outweigh the reasons given by the trustee for deviating from the terms of the decree. *Cunningham et al. vs. Schley et al.* 207.
2. In 3 *Howard's Rep.* 133, *the Supreme Court of the United States* say of a franchise for banking when bought, "the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price." If by this was meant a *special legislative charge or imposition upon the franchise*, the correctness of the principle could not be denied; and if it meant a special tax, *technically speaking*, levied for the support of the government of *Maryland*, it would be void, as repugnant to 13th Article of the *Declaration of Rights of Maryland. Mayor & C. C. of Balt. vs. Balt. & Ohio R. R. Co.* 288.
3. If, as must be done, the *Supreme Court of the United States* are to be understood as speaking in reference to the *general tax*, laid upon *all* property within the State, under the act of 1841, ch. 23, then the proposition referred to, as asserted by that court, cannot be maintained. *Ib.*
4. The case of *Fenwick vs. Chapman*, 9 *Peters*, 461, as decided by the *Circuit Court of the District of Columbia, and the Supreme Court of the United States*, objected to as not containing a correct exposition of the local law of *Maryland*, and not obligatory on this court. *Cornish vs. Willson*, 299.
5. The interpretation of the *S. C.* of *U. S.* to the case of negro *George et al. vs. Corse's Administrator*, 2 *H. & G.* 1, in 9 *Peters*, 476, not adopted by this court. *Ib.*
6. The case of *Allen vs. Sharp*, 7 *G. & J.* 96, explained. *Ib.*
7. The case of negro *George vs. Corse*, 2 *Harris & Gill*, 1, is fully entitled to the confidence of this court—was the unanimous decision of the judges who sat on that cause. *Ib.*
8. There being here no controversy between creditors, but simply whether the appellee was the actual partner of the appellant, this case is not analogous to the case of *ex parte Digby* and *ex parte Buckston*, in 38 *Eng. C. L. Rep.* 495. *Kerr vs. Potter*, 404.
9. The case of *Belt, Wright & Carroll vs. Diggs and others*, decided at June term, 1836, is not in conflict with the decision in this case. *Griffith & Keys vs. Reigart and wife*, 445.
10. This court is not satisfied with the reasoning of the judge who pronounced the opinion in the case of *Brockway vs. The People*, 2 *Hill's N. Y. Rep., page* 550. *Smith vs. The State*, 428.

CITY OF BALTIMORE.

See MAYOR AND CITY COUNCIL.

COMMISSIONS.

1. A guardian in a trust of considerable duration, who performed his duties, except in a failure regularly to pass accounts—who, however, promptly answered—threw no obstacles in the way of investigation, and rendered a general account in his answer to a bill filed against him, is entitled to a commission of seven and one-half *per centum*. *Magruder & wife vs. Darnall and wife*, 269.
2. Where the allowance of that rate of commission exhausted the balance for which the Chancellor decreed, this court reversed the decree, with costs, and dismissed the bill. *Ib.*
3. The auditor allowed the trustees five *per cent.* commission upon certain rents of the trust estate, collected by them in person, and one-half *per cent.* on others, for collecting which, they had previously paid an agent seven and a half *per cent.* and rejected their claim for a solicitor's fee, paid for preparing their answer in this cause. *Held*, that these allowances and this rejection were properly made. *Williams and Prentiss vs. Mosher*, 454.

COMMON CARRIERS.

See REPLEVIN.

CONFIRMATION.

See TRUSTEES' SALES BY ORDER OF COURT.

CONSTITUTIONAL LAW.

1. In 3 *Howard's Rep.* 133, *the Supreme Court of the United States* say of a franchise for banking when bought, "the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price." If by this was meant a *special legislative charge or imposition upon the franchise*, the correctness of the principle could not be denied; and if it meant a special tax, *technically speaking*, levied for the support of the government of *Maryland*, it would be void, as repugnant to 13th Article of the *Declaration of Rights of Maryland*. *Mayor and C. C. of Baltimore vs. Baltimore and Ohio R. R. Company*, 288.
2. If, as must be done, the *Supreme Court of the United States* are to be understood as speaking in reference to the *general tax*, laid upon *all* property within the State, under the act of 1841, ch. 23, then the proposition referred to, as asserted by that court, cannot be maintained. *Ib.*
3. A franchise as property, is, according to its value, liable to taxation for the support of government, whether paid for by a *bonus* or not. *Ib.*
4. The burden or bonus imposed by the charters, or acts reviving the charters of banks in *Maryland*, was not a tax upon the fair value of the privilege or franchise, when granted by the legislature, but the price to be paid or fine levied, for the right of exercising the powers and enjoying the immunities conferred by the charter. It was not a tax for the support of government. *Ib.*

CONSTITUTIONAL LAW—*Continued.*

5. No valuable consideration is necessary to the validity of a legislative grant. *Ib.*
6. The right of taxation is never presumed to be surrendered by the sovereign power; and such surrender is never made, unless it be the result of express terms, or necessary inference. *Ib.*
7. Under the true construction of the 13th Article of our Bill of Rights, we cannot presume that a franchise, if the subject of taxation, may, by its excessive exercise, be destroyed or rendered valueless. *Ib.*
8. This tribunal is bound to submit to the judicial decisions of the Supreme Court of the *U. S.* involving the true construction of the Constitution, treaties, and laws of the *U. S.* Yet there is no obligation on it to acquiesce in the *dicta* of that tribunal, not necessarily established by the matters by it adjudicated. *Ib.*
9. The charter of the *Baltimore and Ohio R. R. Co.*—act of 1826, ch. 123, sec. 18, declares that the shares of the capital stock of that Company shall be considered *personal* estate, and exempt from the imposition of any tax or burthen. *Ib.*
10. The State's right to tax that stock, and the right of all corporations created by the State to tax it, is excluded by the comprehensive and universal terms of the exemption. *Ib.*
11. The specific property of a corporation is as much an ingredient in the shares of its stock, and component part of their value, as in any portion of the corporate property. In the case of the *Baltimore and Ohio R. R. Co.* both are exempt from taxation. *Ib.*
12. The right to tax the stock or the specific property of the *Baltimore and Ohio R. R. Co.* was not re-invested in the State by the act of 1835, ch. 395, sec. 15. *Ib.*

See CORPORATIONS.

CONSTRUCTION OF ACTS AND STATUTES.

1. The courts of the States are the best expounders of the acts of their respective legislatures. *Swatara R. R. Company vs Brune*, 42.
2. Upon an appeal under the act of 1835, ch. 380, from the granting of an injunction only, this court is confined to the case made by the bill or petition. It does not examine the answer. *Wagner and Marshall vs. Cohen*, 97.
3. The necessity of filing an answer is imposed upon the defendant, as one of the conditions on which his right to appeal depends. The object of the act, in such requisition, was to prevent delay. *Ib.*
4. The right to tax the stock or the specific property of the *Baltimore and Ohio R. R. Co.* was not re-invested in the State by the act of 1835, ch. 395, sec. 15. *Mayor and C. C. of Baltimore vs. Baltimore and Ohio R. R. Company*, 288.
5. By the act of 1752, ch. 1, the power of manumitting slaves by last will was taken away; the prohibition continued until a few years before the act of 1796, ch. 67, which latter act restored the right permanently. *Cornish vs. Willson*, 299.

CONSTRUCTION OF ACTS AND STATUTES—*Continued.*

6. The design of the legislature in declaring in the act of 1796, that manumission might be made to take effect at the death of a testator, or at any other period limited in his will, was not to indicate any priority in regard to such manumission, but to put an end to a doubt which then prevailed, whether a deed or will could give freedom to take effect in futuro. *Ib.*

7. The 2d section of the act of 1823, ch. 131, which places creditors whose claims are known to the executor, but who fail to bring them in, in pursuance of notice given, as required by the act of 1798, upon the same footing with those whose claims are unknown, was never designed to apply to cases where notice to the executor or administrator has been given through the medium of a *lis pendens*, or been in due time followed by it. *Stewart vs. Carr et al.* 430.

8. In many cases, the authentication of claims in the particular mode required by the acts of Assembly, is impracticable; the only alternative of the creditor being a resort to a court of justice;—a literal construction, therefore, of the act of 1823 would be fraught with inconsistency and injustice, and will not be placed upon it, if it be susceptible of any other just and rational interpretation. *Ib.*

9. The appellants were appointed executors and trustees under the will of *J. M.* who died on the 27th March, 1845. *Held*, that the commissions of these trustees were subject to the tax of ten *per cent.* in favor of the State, imposed by the act of 1844, ch. 187, though that act did not go into effect until the 2d *June*, 1845. *Williams and Prentiss vs. Mosher*, 454.

10. The act of 1845, ch. 166, requiring trustees to whom any property shall be conveyed for the benefit of creditors, to file with the clerk of the court, where the deed creating the trust is recorded, a bond conditioned for the faithful performance of the trust, is confined in its operation to deeds executed since that act took effect. *Walgamot vs. Davis*, 483.

11. By the act of 1745, ch. 9, the State granted no right which accrued to it subsequently to its passage. *Wilson et al. vs. Inloes et al.* 121.

12. An escheat title accruing in 1759, will not entitle plaintiffs to recover under the act of 1745. *Ib.*

13. An appraisement of a ward's property, made by order of the Orphans court, is not conclusive evidence of the value of such property against the guardian he may rebut it by proof. The act of 1793, ch. 101, sub-chap. 12, sect. 6, does not make it conclusive. *Magruder and wife vs. Darnall and wife*, 269.

CONTRACT.

1. *W. & H.* agreed in writing, signed by them, that *W.* had sold to *H.* "all that part of a tract of land, called *R.*, lying adjoining the turnpike road near where *P.* now lives, at, &c.—we having this day settled our other business without including the sale for this land, we make this memorandum to save trouble in case of accident to either of us." *Held:*

CONTRACT—*Continued.*

1st. That this agreement contained no sufficient description of the land sold; the bounds and quantity are both uncertain and indefinite, and could not be enforced any further than as admitted by *H.*

2d. That claims due *H.* long anterior to the above settlement, must, under the circumstances, be considered as closed. *Dorsey vs. Wayman*, 59.

2. Where a municipal corporation authorized one of its inhabitants to issue small notes as currency, in their name, but for his benefit, and upon his responsibility; and he afterwards, by will, directed his estate to be sold *for the payment of such notes*, the notes being issued in violation of law, a bill, filed to coerce the sale, was held to be an attempt to enforce a void contract, and dismissed. *Baltimore and Susquehanna R. R. Co. vs. Faunce and Passmore*, 69.

3. The law properly withholds its aid when parties ask to enforce an illegal contract; but this is not such a case. The plaintiff does not ask to enforce an illegal contract, nor recover against the defendant for refusing to violate the law. The action is brought to correct a mistake. *Ib.*

4. The construction of written contracts is to be declared by the court, and not submitted to the finding of the jury. *Emery & Gault vs. Owings*, 191.

5. A lease granting the license, right and privilege of quarrying, getting out, working and carrying away granite stone, does not confer the right of carrying away rubble stone. *Ib.*

6. Granite stone is a known article of commerce, sold by the cubic foot, and is called dimension stone; while rubble stone is sold in the mass, or by the perch. *Ib.*

7. Where, as between lessor and lessee, the right existed to quarry and take away *granite* stone, and a payment was made under an agreement, that the same should be applied to the quarry rents thereafter to become due, and the lessor retained the money, he cannot set up, in opposition to the application of such payment to the rent, another claim, as for rubble stone, though connected with the quarry, due from the lessee to him. *Ib.*

8. *S.* agreed to sell *D.* certain lands in *Maryland*. *D.* agreed to give $9,000 for the same, payable in an order on *V.* now in *Mississippi*, to pay him (*S.*) the said amount, by either buying the negroes of *D.* himself, now in his (*V's*) possession, or selling to an amount equal to that sum, or selling such thereof as *V.* can best spare on a credit, if most conducive to *D's* interest, and pass the notes received therefor to *S.* adding to the same the discount thereon, so as to make it equal to $9,000 cash. Upon the receipt of the said notes, *S.* to convey to *D.* *S.* afterwards purchased of *D's* agent certain of the slaves for $4,655 55 in *Mis:* bank paper, which was, in fact, of less value than par; and also received a note from her agent, payable in the same bank paper, of less value than par. *Held:*

1st. There was nothing in the contract which indicated that *D.* was

CONTRACT—*Continued.*

to allow any discount to *S.* except on credit notes taken on the sales of the slaves, and that discount was nothing more than interest on such notes during the periods of their delayed payments.

2d. If *S.* agreed to receive the bank notes in payment of his claim, without any understanding with *D.* that a discount should be allowed him, he receives such notes as a substitute for specie, and they are a payment for their nominal value.

3d. This contract does not require the consideration to be paid in *Mississippi*, or in any particular place. This mode of payment was for the benefit of the vendee.

4th. If the agent in *Mis:* had agreed to purchase the negroes, as provided for by the contract; or, if they had been in *Mis:* sold to a resident of any other State in the *Union*, and the note for the purchase money had been accepted by *S. for delay of payment*, it would have borne the rate of interest of *Mis:*—that being the place of the contract.

5th. The contract in this case does not specify any place of payment. It is therefore, to be considered as a contract to be enforced in *Maryland*, and liable to the rate of interest here. *Costigan and wife vs. Sewall*, 282.

9. On the 11th June, 1840, *N. O.* leased to *E. & G.* a *granite quarry*, known by the name of *F. R. with the license of quarrying* and getting away stone, for the term of six years, from 10th November following, and the lessees went into possession. On the 25th July, 1836, *B. & C.* who had title, leased to *D.* all their estate and interest, being two-third parts *of all that lot*, within the farm of *N. O.* called *F. R.*, for the term of five years, which before the action brought, came to *E. & G.* by assignment, as to one-half. The metes and bounds in both leases were the same. In an action by *N. O.* for the rent due 1st Nov. 1841, under the lease of June, 1840. *Held:*

1st. That the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to the quarry, as it was not opened at the date of that lease.

2d. That this case is not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil; that of 1840 a lease or license to quarry stone.

3d. If a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land, it shall be intended that his interest is as general as his lease.

4th. Making of new mines is waste, unless the lease is of all mines on the land.

5th. A declaration in a lease dated in 1840, that a quarry "had been recently, or a short time ago, possessed and worked by *W.*" cannot be understood as meaning that the quarry was opened four years previously. *Owings & Griffith vs. Emery & Gaull*, 260.

10. In 1841, *K.* obtained a decree in equity against *R.*, who, in 1843, delivered to *K.* his notes, with security, payable in six, twelve, and

CONTRACT—*Continued.*

eighteen months, for about one-fifth of the amount of the decree. *K.* agreed to release *R.* from the decree, provided that, upon failure to pay "the above-mentioned notes at maturity, the decree to continue in full force, and the agreement to be null and void." The two first notes were paid at maturity; and some months after, the third fell due, in 1845, *K.* received and accepted the whole amount, with interest on it to the day of payment. In 1846, *K.* sent out an attachment against *R.* The garnishees pleaded payment by *R.* The effect of the payment of the three notes was the only question submitted to the Court. *Held,*

1st. The receipt of the notes and the acceptance of the security, must have been intended as a satisfaction of the decree, if they had been paid at maturity.

2d. *K.* could not treat the agreement as a nullity, and still hold on to the notes.

3d. The agreement was a compromise, in consideration of security for the compliance of its terms.

4th. On failure to pay the third note at maturity, *K.* might have treated the whole agreement as a nullity; and be remitted to his decree crediting it with the two notes paid.

5th. Time, in such a case, is an essential ingredient of the contract. The stipulation was for the benefit of *K.* who might renounce it. It was voidable at his election.

6th. A condition in a lease, that, upon neglect of the lessee to pay the rent, or any other failure to perform on his part, the lease shall cease and determine, does not render the lease absolutely void, upon the default in performing the condition, but voidable at the election of the lessor; if he elect to waive the forfeiture, the lessee is bound, as though there had been no breach of condition.

7th. If the agreement in this case became a nullity, so did the note. If *K.* had proceeded on his decree, he must have produced the *third* note to be cancelled.

8th. The court will not dispense with the point of time in composition, but it may be waived.

9th. A mere agreement between parties, to accept a *less* sum for a larger amount agreed to be due, is a *nudum pactum*. *Western Bank vs. Kyle*, 343.

CORPORATIONS.

1. The charter of the *Baltimore and Ohio R. R. Co.*—act of 1826, ch. 122, sec. 18—declares that the shares of the capital stock of that Company shall be considered *personal* estate, and exempt from the imposition of any tax or burthen. *Mayor and C. C. of Baltimore vs. Baltimore and Ohio R. R. Company*, 288.

2. The State's right to tax that stock, and the right of all corporations created by the State to tax it, is excluded by the comprehensive and universal terms of the exemption. *Ib.*

3. The specific property of a corporation is as much an ingredient in the

CORPORATIONS—*Continued.*

shares of its stock, and component part of their value, as is any portion of the corporate property. In the case of the *Baltimore and Ohio R. R. Co.* both are exempt from taxation. *Ib.*

4. The Board of Directors of the *Baltimore and Ohio Rail-road Company* having applied $146,816 of the net revenue of the Company for the year 1846, to the re-construction of the road between *Harper's Ferry and Baltimore*, and for machinery and other purposes, leaving a cash balance of only $90,504, and designing to reimburse the stockholders for the amount so applied, in November, 1846, declared a dividend of three dollars per share, payable on and after the 20th of that month, as follows: to all stockholders of less than fifty shares, cash; to all of fifty shares and over, one dollar per share in cash, and two dollars per share in the Company's bonds, bearing interest, payable quarterly, and redeemable in twenty years, and deliverable to the stockholders at the office of the Company. The State being a stockholder to the amount of five thousand shares, refused to receive the dividend as declared by the Company, and instituted an action of *assumpsit*, to recover the amount of *three per cent.* in money. *Held*,

1st. That by the 14th section of its charter, (act of 1836, ch. 123,) the President and Directors of said Company were invested with *all the rights and powers necessary to the construction and repair of a Rail-road from the city of Baltitimore to the Ohio River*, and had a right to expend any part of its revenue for the re-construction of the road.

2d. That the Company could make such expenditure absolutely, and without being bound to refund, or they might appropriate and agree to refund to the stockholders in their discretion.

3d. Under the 19th section of the charter, the Directors are bound to divide only such part of the net profits as they may deem proper, and their judgment of what is proper is conclusive upon the stockholders.

4th. They can apply any portion of the net profits not divided, to any legitimate purpose of the Company. *State vs. Balt. & Ohio R. R. Co.* 363.

5. In all questions of power arising under an act of Assembly, granting a franchise of this description, the test of the existence of the power is to be found in the inquiry, whether the same is expressly granted, or whether it is incidental to any express grant of power, and necessary to its accomplishment. *Ib.*

6. The established rule, that every corporation is limited in its powers by the object to be accomplished; and if there be a specification of the means for accomplishing a particular object, then such specification excludes all others, is admitted, but is not considered as applicable to this case. *Ib.*

7. The 13th section of this charter, giving the power to increase the capital stock on the terms therein mentioned, and to borrow money—however it may exclude other means of accomplishing the construction

CORPORATIONS—*Continued.*

of the road—is no limitation of the grant of *all powers*, limited only by their necessity, conferred by the 14th sec. *Ib.*

8. The design of the 19th sec. was to define what was to be the subject of the dividend, and to prescribe the mode of dividing among the stockholders, and to allow a dividend from time to time, if the President and Directors deemed it proper; but if, in the honest discharge of their duties, they deemed that the net profits should be otherwise applied to further the objects of the act of incorporation, they were at liberty to withhold a dividend. *Ib.*

9. The 19th sec. authorizing the purchase of motive power, &c. with the funds of the Company, to be placed on any *Rail-road constructed by them under the act*, confers the same authority as if there had been a general power to purchase, without any reference to the funds of the Company, and does not militate against the construction above given to the 14th sec. *Ib.*

10. The true construction of the 9th sec. of the act of 1835, ch. 395, which guarantees to the State the payment of the interest on the instalments advanced by her on the stock subscribed for under that act, is that this guarantee is to be satisfied out of the *gross profits* of the Company: and this guarantee is in no manner impaired by the act of 1838, ch. 386. *Ib.*

11. The State was not bound to receive these bonds, (though if accepted, they would have been valid in her hands,) but might treat the dividend, so far as it proposed their delivery, as illegal,—and she has a remedy commensurate with the injury thereby sustained, but not in the form of an action of general *indebitatus assumpsit*. *Ib.*

12. By instituting this form of action, the State affirmed the dividend, and must take it as it is. Hence, she cannot recover the $15,000 in this suit, because the dividend declared did not profess to be a dividend to that extent in money. *Ib.*

13. The relation of trustee and *cestui que trust* exists in a qualified sense, as between the directors and the stockholders, and the funds in the hands of the former in which the latter have an interest, cannot be sued for in this form of action, unless a dividend has been declared. *Ib.*

14. The charter of the Company does not justify the discrimination made between the large and small stockholders, giving to the latter *three per cent.* in money, and to the former, money and bonds. *Ib.*

15. There can be no recovery in this case of the $5,000, which was the amount of the cash dividend payable to the State, there having been no demand for payment thereof, either of the Company, or its authorized agents; such previous demand being clearly necessary to maintain this suit. *Ib.*

16. The establishment of the principle, that suits could be instituted without demand, for dividends declared by banking and other corporations, would greatly impair the value of stocks held therein. *Ib.*

17. Interest will not be chargeable against an incorporation on dividends declared, nor will limitations run until demand made. *Ib.*

See BANKS.

TAXES.

CO-SECURITIES.

See PRINCIPAL AND SURETY.

COURT OF APPEALS.

See PRACTICE IN COURT OF APPEALS.

COURT OF CHANCERY.

1. *C.* and *S.*, brothers, not being indebted to each other, and for a nominal consideration, agreed with each other, that *C.* should convey certain personal property to *S.* *S.* by another agreement, stipulated to re-convey the property to *C.* or to him in trust for his wife and children. *C.* then agreed to confess a judgment to *S.*, who further agreed to sue out execution, levy it upon the whole estate of *C.*, make purchases to the amount of the judgment, and then convey it to *C.* or to him in trust for his wife and children. This judgment was confessed, and *S.* died. It was then revived by his administrators. It appeared in fact, and by the answers to a bill filed by *C.* to vacate the agreements and judgments, and procure a re-conveyance of the property to himself, that their object, *known to both parties*, was to hinder, delay and defraud the creditors of *C.* *Held*, that the complainant was not entitled to relief in equity. *Freeman & Sedwick vs. Sedwick*, 28.

2. It is the policy of the law to withhold all aid and relief from parties in controversies between themselves, who stand strictly *in pari delicto*, and which might or could tend to the consummation of an agreement entered into in fraud of the law, or the rights of any person, unless in cases where public policy would thereby be promoted. *Ib.*

3. *W.* & *H.* agreed in writing, signed by them, that *W.* had sold to *H.* "all that part of a tract of land, called *R.*, lying adjoining the turnpike road near where *P.* now lives, at, &c.—we having this day settled our other business without including the sale for this land, we make this memorandum to save trouble in case of accident to either of us." *Held:*

   1st. That this agreement contained no sufficient description of the land sold; the bounds and quantity are both uncertain and indefinite, and could not be enforced any further than as admitted by *H.*

   2d. That claims due *H.* long anterior to the above settlement, must, under the circumstances, be considered as closed. *Dorsey vs. Wayman*, 59.

4. Where a municipal corporation authorized one of its inhabitants to issue small notes as currency, in their name, but for his benefit, and upon his responsibility; and he afterwards, by will, directed his estate to be sold *for the payment of such notes*, the notes being issued in violation of law, a bill, filed to coerce the sale, was held to be an attempt to enforce a void contract, and dismissed. *Baltimore and Susquehanna R. R. Co. vs. Faunce and Passmore*, 69.

5. A guardian executed a conveyance of negroes, by way of indemnity, to a security in his bond, which security bequeathed them to the wards, according to their respective shares and interests in a legacy made to them by their grandmother, and as a full equivalent for the money they were entitled to receive from her. Upon a bill to compel the

COURT OF CHANCERY—*Continued.*

guardian to account, and for a partition of the negroes, the complainants were held bound to prove the number of wards among whom the property was to be divided, or interested in the legacy. *Hilleary vs. Hurdle*, 105.

6. The testator who held the negroes by way of indemnity had no title to them, unless he was damnified by reason of his suretyship. *Ib.*
7. But the wards might claim the benefit of this collateral security, and ask a sale of the negroes in order to pay any sum of money which it was ascertained the testator, as a security on that bond, was answerable for. *Ib.*
8. Such collateral securities are trusts created for the better security of the debt, and it is the duty of courts to see that they fulfil their design. *Ib.*
9. Securities in a guardian's bond, other than the one indemnified, have an interest in such collateral securities until their liabilities are terminated, and should be consulted, and agree to any other application of the mortgage property than that contemplated by the mortgage. A partition of the negroes among the wards might deprive them of their interest in the indemnity. *Ib.*

   If partition was made, the negroes might be recovered at law.
10. Although a testator may, as between the devisees of his real and personal estate, prescribe the mode in which his debts shall be discharged; and the dispositions made by his will, will be obligatory upon those who accept it; yet he has no power to withdraw from his creditors the personal estate—the primary fund for the satisfaction of their claims. *Buchannan vs. Pue*, 112.
11. The personal estate is the natural and primary fund for the payment of debts and legacies; and even where they are expressly charged upon the real estate descending or devised, the real estate is only to be resorted to as an auxiliary fund, after the personalty has been exhausted. *Cornish vs. Willson*, 299.
12. Upon a bill in equity to sell the real estate of a deceased debtor, on the ground that his personalty was insufficient, Chancery does not take testimony or receive admissions from the executor, that the real estate is sufficient for the payment of the debts of a testator, and, upon being satisfied thereof, ratify the exemption by the testator of his personal estate, adjudicate its disposition as directed by the will, there terminate its power, and leave the creditors to recover their debts as they may. *Ib.*
13. In case where slaves were manumitted by last will, and the personalty was not sufficient for the payment of debts, equity will suspend proceedings at law, which prevented the court of law from doing full justice to all parties; decree a sale of the real estate charged with the payment of debts, and apply the proceeds of sales to their satisfaction. Creditors being thus paid, the manumitted slaves could successfully prosecute their petition for freedom. *Ib.*
14. A testator, by exempting the whole, or any part of his personal estate from the payment of debts, cannot, at law, bar a creditor's suit against

COURT OF CHANCERY—*Continued.*

his executor. Such a bar can only be made available in equity when the intent of the testator may be carried out, and the interests of all concerned protected. *Ib.*

15. In a court of law, equitable assets has no legal entity—are of no value—not recognized by it, and of them no cognizance can be taken. *Ib.*

16. Courts of equity only, prior to the act of 1831, could administer equitable assets. *Ib.*

17. If a creditor having two funds, to which he may resort for the payment of his debt, pursue in equity the fund to which only, another creditor has the right to resort; or if, under the like circumstances, he proceed to prove his debt under a commission of bankruptcy, equity will compel him to seek payment out of that fund, to which such other creditor had no right to resort. *Ib.*

18. But if one of the funds be *legal* assets, and the other equitable, and the creditor is pursuing the *legal* assets, equity will not strip him of his legal rights, marshal the assets, and oblige such creditor to seek payment out of the *equitable* assets. *Ib.*

19. A charge on real estate for the payment of debts or legacies, is peculiarly the subject of equitable jurisdiction in *Maryland*, and of it a court of law can take no cognizance. *Ib.*

20. Manumitted slaves are the proper parties, complainants, to proceed in equity to enforce a charge on lands for the payment of creditors, and seek a sale of real estate—the proceeds of which should be applied to their exoneration. Equity, however, will not decree freedom. *Ib.*

21. The Court of Chancery, except as an appellate tribunal, never interferes to arrest, or set aside, the proceedings of courts of law, or other judicial tribunals, upon the ground of legal error therein, unless prompted by conscience, to prevent wrong and injustice, but leaves the party complainant to his remedy at law. *Methodist P. Church vs. Mayor C. C. of Balt.* 391.

22. Where a party fails to avail himself of the means provided by law, for the redress of the wrong of which he complains, he is without remedy in a Court of Chancery. *Ib.*

23. The law having given to parties considering themselves aggrieved by the proceedings of the street commissioners of the City of *Baltimore*, an appeal to *Baltimore* City Court, they can successfully seek redress only in that tribunal. *Ib.*

24. The appellant and appellee entered into an agreement in writing, by which the former agreed to employ the latter as salesman and clerk in his store, and allow him for his services, one-fourth of the net profits of the business, and which further declared "that thereby the said" appellee "is not made a partner in trade of the said" appellant, "but that the allowance of one-fourth of the net profits, after deducting expenses," &c. "is a compensation for the services of the" appellee "in lieu of clerk hire." *Held*,

That this agreement is conclusive, to show that the parties were not partners, *inter se*, and however the appellee may be held liable as

COURT OF CHANCERY—*Continued.*

to third persons, he has none of the rights and equities of an actual partner,—and therefore, has no more right to call for the interposition of a court of equity, on the ground of lien, than any other creditor of the appellant. *Kerr vs. Potter*, 404.

25. If he performed acts, or stood by and saw others perform them, which would render him liable to the creditors of the concern, the credit given was voluntary, and gave him no other equity than would result to any other person who should become responsible for the appellant's indebtedness. *Ib.*

26. A decree of the Court of Chancery upon a creditor's bill, finally and conclusively establishes the claim of the complainant creditor, and the insufficiency of the personal estate to pay the same, and prevents the running of limitations against the claim, as a simple contract debt. *Griffith & Keys vs. Reigart and wife*, 445.

27. A controversy respecting the validity of the will of *T. C.*, was adjusted by the heir-at-law, conveying by deed all her interest in the real estate of the testator to *G. C.* the executor and ulterior devisee under the will, *in trust* "first to pay her the sum of $30,000," and after reimbursing himself the expenses incurred in contesting the will, then in *further trust*, "for the purposes and trusts expressed in the said will of *T. C.* and the codicils thereto." These trusts were for payment of several annuities and pecuniary legacies to persons specially named, charged upon the lands which the executor had power to sell for that purpose. By one of the codicils, it was provided, that if the provisions of the will should fail, then the estate was to go to "*G. C.* and his heirs." In 1837, *G. C.* as trustee under this deed, sold a part of the lands to the appellant, and afterwards died, leaving the appellee his executor, who in 1841, recovered judgment upon three of the bonds of the appellant, given for the purchase money. This judgment was revived in 1846, and a *fi. fa.* issued thereon; the last instalment of the purchase money having, in the mean time, become due. The appellant then filed a bill in Chancery against all the heirs of *G. C.* and all the *cestui que trusts* under the will, many of whom were minors, to enjoin the executor until a trustee should be appointed by the court, to receive and apply the whole purchase money, which he is willing to pay whenever there is a person in being competent to convey the land so sold to him by *G. C.* in his life-time. *Held*,

That upon the death of *G. C.* the trust descended to his heirs-at-law, some of whom being minors, were legally incompetent to discharge its functions; and the purchaser, being bound to see to the application of his purchase money, has adopted the true and safe course for his protection. *Duffy vs. Calvert*, 487.

28. A proceeding in equity against the heirs of *G. C.* for a title, would not discharge the purchaser from seeing to the application of his purchase money, and therefore, the *cestui que trusts* of the will are necessary parties to any proceeding looking to a conveyance to the appellant. *Ib.*

29. Any attempt to enforce payment of the purchase money, without such

COURT OF CHANCERY—*Continued.*

assurance of title, was properly met by the appellant, in bringing before the court all the parties in interest united, and enjoining them until a trustee should be substituted for the original trustee, to receive and apply the purchase money, and convey the lands. *Ib.*

See EVIDENCE, 37.

FRAUD AND FRAUDULENT CONVEYANCES, 1, 2.

PRACTICE IN CHANCERY.

TRUST, TRUSTEE AND C. Q. TRUST.

COVENANT.

See EVIDENCE, 8.

CRIMES.

1. Leasing to another a house, with the intent of its being used as a common bawdy house, is an offence indictable at common law. *Smith vs. The State*, 425.
2. There can be no doubt that the keeper of a house of this description may be indicted, and he who leases to another a house, with the intent of its being so used, is *particeps criminis*—an aider and abettor in the misdemeanor. *Ib.*
3. The indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted; but it need not state when the lease commenced, or was to end. *Ib.*

DEBTOR AND CREDITOR.

1. Although a testator may, as between the devisees of his real and personal estate, prescribe the mode in which his debts shall be discharged; and the dispositions made by his will, will be obligatory upon those who accept it; yet he has no power to withdraw from his creditors the personal estate—the primary fund for the satisfaction of their claims. *Buchanan vs. Pue*, 112.

See LEGACY—LEGATEE.

WILL AND TESTAMENT, 12 to 14.

DECREE.

See COURT OF CHANCERY, 26.

DEVISE.

See WILL AND TESTAMENT.

EJECTMENT.

1. If a tract of land call to begin at a bounded tree by the side of a branch, and to run then course and distance to a *known* boundary, and the beginning tree be lost, to find the commencement of the first line of the tract, you must reverse the course and distance from the *known* boundary, and not elongate nor shorten the line to the branch. The expression as to the branch being merely descriptive of the general locality of the tree, and not an imperative call, locating the spot where the tree stood; and it is no objection to this rule, that by the reversal of the line, the beginning is shown to be in deep navigable water, at a great distance from the shore, or where the lost beginning could not have stood. *Wilson et al vs. Inloes et al*, 121.

EJECTMENT—*Continued.*

2. The leading object in the gratification of all calls is certainty in the location of grants of land. *Ib.*
3. It is a general rule, that if there be a peremptory call to an object of length by a course and distance line, and the object can be reached by gratifying the distance, but violating the course; or by conforming to the course, and disregarding the distance—the course must control the distance. *Ib.*
4. The word "by," when descriptively used in a grant, as in this case, does not mean "in immediate contact with," but "near" to the object to which it relates; and "near" is a relative term, meaning, when used in land patents, very unequal and different distances. *Ib.*
5. The reason assigned for running lines of lands to the boundaries called for at their terminations, instead of terminating them according to their courses and distances, is not exclusively, that greater certainty, as to the termini of such lines, is thereby attained; but also, because, thus locating grants, is more beneficial to grantees; and because, it is a rule of construction in expounding grants, to give them that interpretation, which operates most strongly against grantors, and in favor of the grantees. *Ib.*
6. A deed or patent for a tract of land passes nothing, unless the land described therein is susceptible of location; or, in other words, unless the survey thereof can be made to close, either as to the whole conveyed, or some definite part thereof. *Ib.*
7. If a tract of land be granted by *boundaries* only, without courses and distances, if the beginning or any subsequent boundary be lost, and its original situs cannot be proved, the entire tract is lost, and the grant thereby becomes inoperative. *Ib.*
8. If a tract be granted by courses and distances only, without calling for any boundary or object, save that at the commencement of the first line, and it be lost, and no proof can be adduced of the beginning or ending of *any* of its lines, the tract becomes a non-entity—the grant a nullity. *Ib.*
9. If a grant be made, not only with courses and distances, but with calls, it has a principle of self-sustentation, not possessed by grants with course and distance, or with calls only. *Ib.*
10. Where a grant is by course and distance and calls, if the beginning, and any, or all the boundaries, *save one*, are lost and incapable of proof, the vitality of the grant still continues. This is the natural import of the express words of the grant. *Ib.*
11. It cannot be denied, that a valid survey or grant may be made without stating any natural object as being the *beginning* of its first line, if there be a boundary at the *termination* thereof. *Ib.*
12. It is no objection to the validity of a grant, that the place of its beginning is covered with water, whether navigable or otherwise; or that any of its lines run across such water. *Ib.*
13. In cases of grants of land, describing it by courses and distances and calls, the courts of this State have determined that, in locating them,

EJECTMENT—*Continued.*

they shall first be run by the calls; but if that be impracticable, they shall then be located by course and distance. *Ib.*

14. In an action of ejectment, the plaintiff, to prove the death of *O.* before the year 1745, without heirs, and intestate, offered in evidence a warrant of resurvey to *E. F.*, issued in 1725, a certificate of survey returned under such warrant, dated 21st September, 1726, but upon which no patent appeared to have been issued; and also an escheat patent relating to the same lands, granted 28th September, 1759, founded upon a special warrant of resurvey, dated 18th June, 1759, returned on the 30th of that month. The defendant objected to the admissibility of the warrant of resurvey to *E. F.* and certificate returned thereon, either with, or independent of the escheat patent of 1759, and proceedings, on which the same were founded. *Held*, the proceedings on that warrant not having been prosecuted, no purchase money being paid by *E. F.* nor patent accepted by him, neither the warrant nor certificate were proof of the facts recited in them, as to the death of *O.* at the time specified. Such statements were discredited, by the refusal of *E. F.* to consummate his title, and his omission or refusal to pay for the lands was evidence that he had discovered, that no title by escheat had devolved on the Lord Proprietary. *Ib.*

15. An exemplification of the return of the surveyor to a warrant of resurvey, dated 1707, with the depositions of witnesses, and inquisition of a jury called under the warrant of resurvey, executed on the 4th March, 1706–7—finding the beginning of a tract of land with its courses and distances, and other boundaries, recorded among the land records of *Baltimore* County, and certified under the seal of that County Court to be a true copy, is not evidence—because there existed, at the date of those proceedings, no law which authorized such proceedings to be recorded. *Ib.*

16. The proceedings in question were also inadmissible in evidence, because they purported to locate the tract of land described in them, in a way wholly inconsistent with the calls and expressions contained in its original patent. *Ib.*

17. Where a prayer called for an instruction to the jury, "that if they should find that the *beginning* of *B. V.* is not truly located on the plats by the defendant, then the plaintiffs are entitled to recover;" and it appeared that the *beginning of the tract claimed by them was admitted by the locations of both parties;* and that the patent for *B. V.* declared such *beginning* to be the *end* of its first line; and the bounded tree called for at the *beginning* of *B. V.* being lost, was to be found, *as a matter of law*, by reversing the course and distance of the first line of *B. V.*, the jury cannot find to the contrary,—and consequently the refusal to grant the prayer is not error. *Ib.*

18. By the act of 1745, ch. 9, the State granted no right which accrued to it subsequently to its passage. *Ib.*

EJECTMENT—*Continued.*

19. An escheat grant by the State is no evidence of the existence of the facts constituting the escheat, anterior to the date of the warrant. *Ib.*
20. An escheat title accruing in 1759, will not entitle the plaintiffs to recover, under the act of 1745. *Ib.*
21. A jury has no discretionary power to find, as matter of fact, that which is matter of law. *Ib.*
22. Expressions in a grant, intended merely as generally descriptive of locality, have not a conclusive and restrictive import. *Ib.*
23. By the grant of a tract of land, lying in *Chesapeake* bay, and on the *north* side of a river, called *P.*, and on the *north* side of the *north-west* branch of said river, beginning at a marked red oak, by a little branch, and running up along the north-west branch for breadth; it is not required that a tract—the *end* of whose first line was the *beginning* of the tract above described—should be located on the north side of the river *P.* *Ib.*
24. Where the witness had been surveyor of the county, (where land claimed is situated,) for *sixteen years*, and assistant of the county surveyor for many years previous, and testified that the beginning tree of a tract of land could not be found, that he had never heard of it, and had found the beginning, by reversing the course and distance of the patent from another boundary—this is sufficient evidence of an endeavor, on the part of the party seeking to establish the *lost beginning*, to find the position of the same. *Ib.*
25. The jury is the proper tribunal to decide whether any and what variation ought to be allowed in the location of lands. *Ib.*
26. Whether any and what degree of allowance for variation should be made, are questions of fact to be determined by the jury on testimony upon that subject adduced to them in the trial of the cause. *Ib.*
27. If no such testimony be offered, the jury are not authorized to depart from the courses and distances expressed in the conveyances, by making any allowance for variation. *Ib.*
28. Where there is a total absence of the testimony in relation to variation, the court ought not to instruct the jury on that subject. *Ib.*
29. Where the court reverses the judgment of the County Court for error in instruction as to a question of variation of the compass, and perceives that by no allowance for such variation which the jury could rationally have made, the merits of the controversy could be affected, it will not award a procedendo.
30. Where a line calls to terminate at a bounded tree without any other reference, and the tree is lost, and there is no location or evidence to prove that where such line, run course and distance, terminates, is not and always has been high and fast land, the court will not instruct the jury that the line cannot be run into the water of a navigable stream. The court will not presume that the bounded tree may not have stood in navigable water. *Ib.*
31. Where the beginning tree of a tract is admitted upon the plats, both parties are estopped from denying its location. *Ib.*
32. Where the termination of a line of one tract imperatively calls for the

EJECTMENT—*Continued.*

beginning tree of another, and the tree so called for is admitted as the beginning tree, it is equally admitted as the terminus called for. *Ib.*

33. Where there is error in a patent, either in the description of the tree alleged to stand at the *beginning* of the first line of the tract, or in the boundary stated to stand at the end of that line, where these descriptions are irreconcilable, and one or the other must be rejected,—under such circumstances, the court will enquire into the probabilities of mistake, as to the boundaries called for, and look at the consequences which would result from rejecting the one or the other. *Ib.*

34. There is no difference between the weight to be ascribed to a call for a boundary, or matter of description thereof, when referred to as the beginning of a tract, or as the terminus of one of its lines. *Ib.*

35. In determining upon such probabilities, the court will examine the courses, descriptions, calls and boundaries of the title papers, to ascertain if the surveyor made any mistake therein—what evidence he had before him, and what he designed to do. *Ib.*

36. An error of description in a survey, adopted in a patent, manifestly founded in mistake or falsehood, is insufficient to control other calls and expressions inconsistent therewith. *Ib.*

37. Where the assumption of mistake in a single description, harmonizes all the rest of a patent, the court will make such assumption. *Ib.*

38. The designed non-disclosure of the fact to the Lord Proprietary or his agents, that a warrant of resurvey as executed was covered by navigable water, is not a fraud, and will not vacate a patent issued thereon. *Ib.*

39. The rights of piscary and navigation remain unimpaired by the grant of land covered by navigable water. *Ib.*

40. For a fraud practised on the Lord Proprietary, he only, or those subsequently claiming under him, have a right to complain. It is not a matter on which his patentees may claim to expand their rights. *Ib.*

41. To produce accordance between a line and its call, the running of the next preceding line cannot be changed; such changes would be in conflict with the grant. *Ib.*

EQUITY.

See COURT OF CHANCERY.

ESCHEAT.

See EJECTMENT.

ESTOPPEL.

See EJECTMENT, 31.

EVIDENCE.

1. *C.* drew a bill of exchange on *B.* payable ninety days after date, endorsed by *W.* in blank. It was negotiated with *P.* who endorsed it specially to *D.* On presentation for acceptance, it was refused, protested, and returned by *D.* to *P.* when the latter erased his special endorsement, and re-transmitted the bill to *D.* who sued *W.* upon his endorsement. The defendant, in support of his defence, had proved by *P.* the erasure of his endorsement; and the plaintiff then proposed to ask him to state the reasons which induced him to strike it out.

EVIDENCE—*Continued.*

This the County Court refused to sanction. *Held*, there was no good reason for the refusal, unless it be that the fact of the erasure, as proved by the defendant, could not prejudice the plaintiffs. If it had been of any importance to know why the erasure had been made, it must have been reasonable to permit the witness to state when, why, and under what circumstances, it was made. *Burckmyer & Adams vs. Whiteford*, 1.

2. Upon the return of a bill of exchange, drawn at *Baltimore*, upon a house at *Charleston*, *S. C.* protested for non-acceptance, which had been endorsed generally by the payee, the holder in *Baltimore* struck out his special endorsement, and by letter transmitted it to the plaintiffs, residents in *Charleston*, and claimed the amount of the bill from them, informing them it had been charged to their account, and he expected a credit for it. *Held*, that in an action by the house at *Charleston*, against the payee and endorser of the bill, this letter, in connection with parol proof in the cause, was evidence to show the right of the plaintiffs to institute the action. *Ib.*
3. This letter was evidence as a part of what passed between the holder of the bill and the house at *C.* in relation to its transfer to them. It is a part of the *res gesta* of the surrounding and cotemporaneous circumstances of the transaction. *Ib.*
4. The admissibility in evidence, of the surrounding circumstances of a case, is to be determined by the court, according to the degree of their relation to the principal fact in controversy, and in the exercise of its sound discretion. *Ib.*
5. In a case where the plaintiff's right to sue upon a bill of exchange was denied, he may prove its delivery to counsel, and the fact of his counsel's possession, for the purpose of the suit, when the action was commenced. *Ib.*
6. Where the attorney of the plaintiff is in possession of a bill of exchange at the time of the action brought, the presumption is that he is rightfully in possession. *Ib.*
7. The plaintiffs, on the 21st September, 1844, filed proceedings in *Baltimore* County Court, under the act of 1838, ch. 205, to establish a lien for work and labor done upon a house in the city of *Baltimore*, at the request of J. The claim filed showed that the work had been done between May and September, 1844, and the proof *offered* in support of it was the written admission of J. made in September, 1844, that the claim was correct. It appeared that in July, 1844, he had mortgaged this property to W. *Held:* That a mortgage would afford very little security for the debt intended to be secured thereby, if, after its execution, the mortgagor could by admissions create liens on the mortgaged premises; and thereby lessen or destroy the value of the mortgage. *Carson vs. White*, 17.
8. The mortgagor can by no acknowledgment subsequent to the mortgage, prejudice the interest of the mortgagee; and hence the admission in this case ought not to have been received. *Ib.*

EVIDENCE—*Continued.*

9. When a fact is admitted, of which written evidence alone was competent, and the admission is silent as to the nature of the proof, the court will not infer that it was verbal, nor that it was not within some one of the exceptions to the general rule. *Swatara Rail Road Co. vs. Brune*, 42.

10. In an action of covenant, the defendant pleaded *non infregit*, &c. with liberty to give in evidence any matter he might have pleaded; *provided*, he gave notice to the plaintiff of the matter of such evidence within, &c.—not having given the notice, the cause stood under the plea filed. *Held:* That in such action under that plea, a parol agreement by which the time of performance of the covenant was enlarged, is not admissible in evidence. *Franklin Fire Insurance Co. vs. Hamill*, 87.

11. A release of all claims against a guardian concerning specific personal property, is evidence of the delivery of such property to the releasor, his ward. *Magruder and Wife vs. Darnall and wife*, 269.

12. An appraisement of a ward's property, made by order of the Orphans court, is not conclusive evidence of the value of such property against the guardian; he may rebut it by proof. The act of 1798, ch. 101, sub-chap. 12, sect. 6, does not make it conclusive. *Ib.*

13 An account of a guardian charging himself with one year's use of the minor's estate, and crediting the whole amount of allowances—examined and passed by the Orphans court which appointed him—is a judicial act of that court, and is *prima facie* evidence of the matters therein contained. It may be impeached by proof. *Ib.*

14. Upon the trial of a petition for freedom, the petitioner offered in evidence the will of his master—proof of his identity, and his right to freedom, according to the terms of the will. The defendant then proved, that the executors took upon themselves the duty of administration; copies of their letters and bond; inventory of the personal estate, including the slaves; debts due the deceased; several administration accounts showing ultimately an over-payment by the executors, the negroes being still undisposed of, and charged to them at the appraisement. The defendant further proved an order of the *Orphans Court* directing a sale of the balance of the testator's personal estate, and an account of sales of negroes returned, including the petitioner, who objected to the admissibility in evidence, of the accounts of the executor, the order of sale of the *Orphans Court*, and return of sales by the executors, which objection was overruled. This was affirmed upon appeal. *Cornish vs. Willson*, 299.

15. Upon a petition for freedom in a court of law, no evidence of the value of real estate can legally be submitted to the jury, or form a subject for its determination. *Ib.*

16. Appraisements of value of land are often uncertain and fallacious proof. An actual sale is higher proof. *Ib.*

17. An executor who, upon his own knowledge only, admits that lands charged with the payment of debts, are of sufficient value to satisfy

EVIDENCE—*Continued.*

the creditors—the personal estate being insufficient—permits the manumitted slaves of the testator to go free, and assents to their legacy of freedom, commits a *devastavit*, and is an incompetent witness to prove the facts necessary to justify his course. *Ib.*

18. A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing to show the loss less than that claimed, would be admissible. The doctrine relative to mitigation of damages has no application to such a case. *Franklin Fire Insurance Co. vs. Hamill*, 87.

19. A party cannot agree upon a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, as that it was not in writing. *Swatara R. R. Co. vs. Brune*, 41.

20. In an action of ejectment the plaintiff, to prove the death of *O.* before the year 1745, without heirs, and intestate, offered in evidence a warrant of resurvey to *E. F.*, issued in 1725, a certificate of survey returned under such warrant, dated 21st September, 1726, but upon which no patent appeared to have been issued, and also an escheat patent relating to the same lands, granted 28th of September, 1759, founded upon a special warrant of resurvey, dated 18th June, 1759, returned on the 30th of that month. The defendant objected to the admissibility of the warrant of resurvey to *E. F.* and certificate returned thereon, either with, or independent of the escheat patent of 1759, and proceedings, on which the same were founded. *Held*, the proceedings on that warrant not having been prosecuted, no purchase money being paid by *E. F.* nor patent accepted by him, neither the warrant nor certificate were proof of the facts recited in them, as to the death of *O.* at the time specified. Such statements were discredited by the refusal of *E. F.* to consummate his title, and his omission or refusal to pay for the lands was evidence that he had discovered that no title by escheat had devolved on the Lord Proprietary. *Wilson et al. vs. Inloes et al.* 122.

21. An exemplification of the return of the surveyor to a warrant of resurvey, dated 1707, with the depositions of witnesses, and inquisition of a jury called under the warrant of resurvey, executed on the 4th March, 1706–7—finding the beginning of a tract of land with its courses and distances, and other boundaries, recorded among the land records of *Baltimore* County, and certified under the seal of that County Court to be a true copy, is not evidence—because there existed at the date of those proceedings no law which authorized such proceedings to be recorded. *Ib.*

22. The proceedings in question were also inadmissible in evidence, because they purported to locate the tract of land described in them, in a way wholly inconsistent with the calls and expressions contained in its original patent. *Ib.*

23. An escheat grant by the State is no evidence of the existence of the facts constituting the escheat anterior to the date of the warrant. *Ib.*

EVIDENCE—*Continued.*

24. Expressions in a grant, intended merely as generally descriptive of locality, have not a conclusive and restrictive import. *Ib.*

25. Where the witness had been a surveyor of the county, (where land claimed is situated,) for *sixteen years*, and assistant of the county surveyor for many years previous, and testified that the beginning tree of a tract of land could not be found, that he had never heard of it, and had found the beginning by reversing the course and distance of the patent from another boundary—this is sufficient evidence of an endeavor, on the part of the party seeking to establish the *lost beginning*, to find the position of the same. *Ib.*

26. The jury is the proper tribunal to decide whether any and what variation ought to be allowed in the location of lands. *Ib.*

27. Whether any and what degree of allowance for variation should be made, are questions of fact to be determined by the jury on testimony upon that subject adduced to them in the trial of the cause. *Ib.*

28. If no such testimony be offered, the jury are not authorized to depart from the courses and distances expressed in the conveyances, by making any allowance for variation. *Ib.*

29. Where there is a total absence of the testimony in relation to variation, the court ought not to instruct the jury on that subject. *Ib.*

30. Where a line calls to terminate at a bounded tree without any other reference, and the tree is lost, and there is no location or evidence to prove that where such line, run course and distance, terminates, is not and always has been high and fast land, the court will not instruct the jury that the line cannot be run into the water of a navigable stream. The court will not presume that the bounded tree may not have stood in navigable water. *Ib.*

31. Where the beginning tree of a tract is admitted upon the plats, both parties are estopped from denying its location. *Ib.*

32. Where the termination of the line of one tract imperatively calls for the beginning tree of another, and the tree so called for is admitted as the beginning tree, it is equally admitted as the terminus called for. *Ib.*

33. Where there is error in a patent, either in the description of the tree alleged to stand at the *beginning* of the first line of the tract, or in the boundary stated to stand at the end of that line, where these descriptions are irreconcilable, and one or the other must be rejected,—under such circumstances, the court will enquire into the probabilities of mistake, as to the boundaries called for, and look at the consequences which would result from rejecting the one or the other. *Ib.*

34. There is no difference between the weight to be ascribed to a call for a boundary, or matter of description thereof, when referred to as the beginning of a tract, or as the terminus of one of its lines. *Ib.*

35. In determining upon such probabilities, the court will examine the courses, descriptions, calls and boundaries of the title papers, to ascertain if the surveyor made any mistake therein—what evidence he had before him, and what he designed to do. *Ib.*

36. The testimony of but one witness is clearly insufficient to overthrow the

EVIDENCE—*Continued.*

responsive and positive denials of an answer. *Methodist Prot. Church vs. Mayor and C. C. of Balt.* 391.

37. On whom the burden of proof rests of proving the amount of debts—a sufficiency or insufficiency of assets, upon a petition for freedom.—*Qr. Cornish vs. Willson*, 299.

See PRACTICE IN CHANCERY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

EXECUTOR AND ADMINISTRATOR.

1. To executors only are confided the ascertainment and payment of testator's debts. *Emery & Gault vs. Owings*, 191.
2. Prior to the act of 1831, ch. 315, sec. 10, money coming into the hands of an executor or administrator from his sale of real estate for the payment of debts, was not covered by the testamentary or administration bond. By that act, the law was changed. *Cornish vs. Willson*, 299.
3. If a petition for freedom were filed by such manumitted slaves, no court in *Maryland* would award their freedom—and thus release the executor—until the time had elapsed within which the creditors were warned to bring in their claims, and the executor was required to settle an account of his administration with the Orphans court; nor then, unless the court are not perfectly satisfied that the liberation of the manumitted slaves can work no prejudice to creditors. *Ib.*
3. When an executor fails to give the notice to creditors to exhibit their claims, required by the 13th section of the 8th sub-chapter of the act of 1798, ch. 101, he will not be entitled to the exemption from liability, provided for in the 15th section of the same sub-chapter of the same act. *Steuart vs. Carr et al.* 430.
4. And if an executor departs from the due course of administration, by paying legacies, after he has acquired knowledge of the claim of a creditor, he will not be exempt from liability for such claim, even though he had previously given the requisite notice to creditors. *Ib.*
5. Before certain legacies became due and payable under the will, the executor and his co-residuary legatee entered into an agreement in writing, under seal, by which they bound themselves to pay interest on said legacies, semi-annually, from the time they became due until paid; the principal to be paid by the executor in due course of administration. *Held,*

   That such a contract cannot impair, destroy or change the rights or priorities of other creditors or legatees, arising under a due course of administration, even if it should be regarded as expressly binding the obligors to pay the legacies therein mentioned. *Ib.*
6. Whilst an executor acting in the faithful discharge of his duties, will receive the favor and protection of a court of equity, yet if he enters into a covenant, either for his own benefit, or that of him with whom he contracts, by which he binds himself personally for the payment of a debt or legacy, which with the assets then in his hands, and in due course of administration he was not then in a condition to pay, he must take the consequences of his own gratuitous act. *Ib*

EVIDENCE—*Continued.*

7. The 2d section of the act of 1823, ch. 131, which places creditors whose claims are known to the executor, but who fail to bring them in, in pursuance of notice given, as required by the act of 1798, upon the same footing with those whose claims are unknown, was never designed to apply to cases where notice to the executor or administrator has been given through the medium of a *lis pendens*, or been in due time followed by it. *Ib.*

8. In many cases, the authentication of claims in the particular mode required by the acts of Assembly, is impracticable; the only alternative of the creditor being a resort to a court of justice;—a literal construction, therefore, of the act of 1823 would be fraught with inconsistency and injustice, and will not be placed upon it, if it be susceptible of any other just and rational interpretation. *Ib.*

See LEGACY—LEGATEE.

FIERI FACIAS.

See ATTACHMENT TO COMPEL APPEARANCE.

FISHERY AND NAVIGATION.

1. The rights of piscary and navigation remain unimpaired by the grant of land covered by navigable water. *Wilson et al vs. Inloes et al.* 121.

FRANCHISE.

See CORPORATIONS.

FRAUD—FRAUDULENT CONVEYANCES.

1. *C.* and *S.*, brothers, not being indebted to each other, and for a nominal consideration, agreed with each other, that *C.* should convey certain personal property to *S.* *S.* by another agreement, stipulated to re-convey the property to *C.* or to him in trust for his wife and children. *C.* then agreed to confess a judgment to *S.*, who further agreed to sue out execution, levy it upon the whole estate of *C.*, make purchases to the amount of the judgment, and then convey it to *C.* or to him in trust for his wife and children. This judgment was confessed, and *S.* died. It was then revived by his administrators. It appeared in fact, and by the answers to a bill filed by *C.* to vacate the agreements and judgments, and procure a re-conveyance of the property to himself, that their object, *known to both parties*, was to hinder, delay and defraud the creditors of *C.* *Held*, that the complainant was not entitled to relief in equity. *Freeman & Sedwick vs. Sedwick*, 28.

2. It is the policy of the law to withhold all aid and relief from parties in controversies between themselves, who stand strictly *in pari delicto*, and which might or could tend to the consummation of an agreement entered into in fraud of the law, or the rights of any person, unless in cases where public policy would thereby be promoted. *Ib.*

FREEDOM.

See NEGROES AND SLAVES.

GRANITE STONE.

See CONTRACT, 5, 6, 7.

GRANTS.

See EJECTMENT.

GUARDIAN AND WARD.

1. A guardian may be responsible to his ward as bailiff, or guardian before he bonds; but in such a case, the bill should charge an entry on the ward's estate, and perception of profits before he bonded. *Magruder and wife vs. Darnall and wife*, 269.
2. But where the bill is framed in reference to his duty as guardian, deriving his authority as such from his appointment, the account should be taken from the date of his bond. *Ib.*
3. When it is claimed to charge a guardian with perception of rents and profits before he bonded, as well as after, and there were no allegations in the bill on the subject of profits before his appointment, that question is not in issue in the cause. *Ib.*
4. A release of all claims against a guardian concerning specific personal property, is evidence of the delivery of such property to the releasor, his ward. *Ib.*
5. An appraisement of a ward's property, made by order of the Orphans court, is not conclusive evidence of the value of such property against the guardian; he may rebut it by proof. The act of 1793, ch. 101, sub-chap. 12, sect. 6, does not make it conclusive. *Ib.*
6. An account of a guardian charging himself with one year's use of the minor's estate, and crediting the whole amount of allowances—examined and passed by the Orphans court which appointed him—is a judicial act of that court, and is *prima facie* evidence of the matters therein contained. It may be impeached by proof. *Ib.*
7. Where the entire estate in the hands of a guardian is not more than necessary to pay expenses, proper and necessary to be made, and which were made, the court will not reverse a decree, to enable them to charge the guardian with a greater sum by way of interest. *Ib.*
8. A guardian in a trust of considerable duration, who performed his duties, except in a failure regularly to pass accounts—who, however, promptly answered—threw no obstacles in the way of investigation, and rendered a general account in his answer to a bill filed against him, is entitled to a commission of seven and one-half *per centum*. *Ib.*

INADEQUACY OF PRICE.

See TRUSTEES SALES UNDER ORDER OF COURT.

INDICTMENT.

See CRIMES, 3.

INJUNCTION.

1. After decree for a sale of real property, a sale reported by the trustee, and exceptions filed to its ratification still pending, a party interested in the proceeds of sale applied to the Chancellor for an injunction, on the ground that the reported purchaser, without the sanction of the court or those interested, had assumed the power to rent the property—and that it was about to be used by his lessee. The object of the injunction was to restrain such use. *Held*, that as it was not alleged that the property was subject to waste in the hands of the purchaser, or his lessee, or that its preservation was endangered by the disposition which the reported purchaser had made of it—the injunction should not have been granted. *Wagner & Marshall vs. Cohen*, 97.

INSOLVENT DEBTOR.

1. An insolvent is one who has not property enough to pay all his debts. *Cornish vs. Willson*, 299.

INSTRUCTIONS TO JURY.

See PRACTICE.

INSURANCE.

1. A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing to show the loss less than that claimed, would be admissible. The doctrine relative to mitigation of damages has no application to such a case. *Franklin Fire Insurance Co. vs. Hamill*, 87.
2. In an action of covenant, where the plaintiff was not entitled to recover, unless he proved that the property insured was destroyed by fire; that notice of the loss, and an estimate of damage sustained, were furnished the underwriter, according to the terms of the policy, it is error in the County Court to instruct the jury, that the plaintiff is entitled to recover, in such a form as to take from them the consideration of the fact, when the fire occurred, and assume the day, or that notice of the disaster was forthwith communicated, and a particular account of loss furnished to the company. *Ib.*

INTEREST.

1. Interest will not be chargeable against an incorporation on dividends declared, nor will limitations run until demand made. *The State vs. Balt. & Ohio R. R. Co.*, 363.
2. The contract in this case does not specify any place of payment. It is therefore, to be considered as a contract to be enforced in *Maryland*, and liable to the rate of interest here. *Costigan and wife vs. Sewall*, 232.
3. If the agent in *Mis.* had agreed to purchase the negroes, as provided for by the contract; or, if they had been in *Mis.* sold to a resident of any other State in the *Union*, and the note for the purchase money had been accepted by *S. for delay of payment*, it would have borne the rate of interest of *Mis.*—that being the place of the contract. *Ib.*

JURISDICTION.

See COURT OF CHANCERY, 19 to 21.

LANDLORD AND TENANT.

See PRACTICE, 32.

LAND OFFICE.

1. A deed or patent for a tract of land passes nothing, unless the land described therein is susceptible of location; or, in other words, unless the survey thereof can be made to close, either as to the whole conveyed, or some definite part thereof. *Wilson et al vs. Inloes et al*, 121.
2. If a tract of land be granted by *boundaries* only, without courses and distances, if the beginning or any subsequent boundary be lost, and its original situs cannot be proved, the entire tract is lost, and the grant thereby becomes inoperative. *Ib.*
3. If a tract be granted by courses and distances only, without calling for any boundary or object, save that at the commencement of the first

LAND OFFICE—*Continued.*

line, and it be lost, and no proof can be adduced of the beginning or ending of *any* of its lines, the tract becomes a non-entity—the grant a nullity. *Ib.*

4. If a grant be made, not only with courses and distances, but with calls, it has a principle of self-sustentation, not possessed by grants with course and distance, or with calls only. *Ib.*
5. Where a grant is by course and distance and calls, if the beginning, and any, or all the boundaries, *save one*, are lost and incapable of proof, the vitality of the grant still continues. This is the natural import of the express words of the grant. *Ib.*
6. It cannot be denied, that a valid survey or grant may be made without stating any natural object as being the *beginning* of its first line, if there be a boundary at the *termination* thereof. *Ib.*
7. It is no objection to the validity of a grant, that the place of its beginning is covered with water, whether navigable or otherwise; or that any of its lines run across such water. *Ib.*
8. In cases of grants of land, describing it by courses and distances and calls, the courts of this State have determined that, in locating them, they shall first be run by the calls; but if that be impracticable, they shall then be located by course and distance. *Ib.*
9. An escheat grant by the State is no evidence of the existence of the facts constituting the escheat, anterior to the date of the warrant. *Ib.*
10. An escheat title accruing in 1759, will not entitle the plaintiffs to recover, under the act of 1745. *Ib.*
11. By the grant of a tract of land, lying in *Chesapeake* bay, and on the *north* side of a river, called *P.*, and on the *north* side of the *north-west* branch of said river, beginning at a marked red oak, by a little branch, and running up along the north-west branch for breadth; it is not required that a tract—the *end* of whose first line was the *beginning* of the tract above described—should be located on the north side of the river *P.* *Ib.*
12. An error of description in a survey, adopted in a patent, manifestly founded in mistake or falsehood, is insufficient to control other calls and expressions inconsistent therewith. *Ib.*
13. The designed non-disclosure of the fact to the Lord Proprietary or his agents, that a warrant of resurvey as executed was covered by navigable water, is not a fraud, and will not vacate a patent issued thereon. *Ib.*
14. The rights of piscary and navigation remain unimpaired by the grant of land covered by navigable water. *Ib.*
15. For a fraud practised on the Lord Proprietary, he only, or those subsequently claiming under him, have a right to complain. It is not a matter on which his patentees may claim to expand their rights. *Ib.*
16. To produce accordance between a line and its call, the running of the next preceding line cannot be changed; such changes would be in conflict with the grant. *Ib.*

See EJECTMENT.

LAPSE OF TIME.

See LIMITATION OF ACTIONS, 6.

LEGACY—LEGATEE.

1. A legacy, delivered by an executor to a legatee, upon the entire confidence, sincerely entertained, that the assets of his testator would be sufficient for the payment of debts, but which proved to be inadequate, without default in the executor, may be recovered in equity. *Buchanan vs. Pue*, 112.
2. A mere agreement to refund does not, in such a case, affect the rights of the parties. *Ib.*
3. Payment of a legacy, voluntarily made on a mistaken ground of fact, may be reclaimed. *Ib.*
4. Gratuitous services of great merit, rendered by a legatee to his testator, do not constitute the legatee a purchaser of his legacy. *Ib.*
5. A general legacy, given in consideration of a debt due the legatee, or relinquishment of any right or interest since the bequest, is not made as a bounty, but as purchase money, and will be entitled to a preference of payment over other general voluntary legacies. *Ib.*
6. In a case of deficiency of assets, all specific have a priority in payment over general legacies. All specific legacies, in this respect, stand on the same footing, unless testator otherwise intended. *Cornish vs. Willson*, 299.
7. All debts and legacies are payable out of personal estate, and are only chargeable upon real estate by the will, either by its express terms or necessary implication from its language. *Ib.*
8. Before certain legacies became due and payable under the will, the executor and his co-residuary legatee entered into an agreement in writing, under seal, by which they bound themselves to pay interest on said legacies, semi-annually, from the time they became due until paid; the principal to be paid by the executor in due course of administration. *Held*,

   That such a contract cannot impair, destroy or change the rights or priorities of other creditors or legatees, arising under a due course of administration, even if it should be regarded as expressly binding the obligors to pay the legacies therein mentioned. *Steuart vs. Carr*, 430.

See WILL AND TESTAMENT, 12, 13.
EXECUTOR AND ADMINISTRATORS.
ORPHANS COURT.

LESSOR—LESSEE—LEASE.

1. On the 11th June, 1840, *N. O.* leased to *E. & G.* a *granite quarry*, known by the name of *F. R. with the license of quarrying* and getting away stone, for the term of six years, from 10th November following, and the lessees went into possession. On the 25th July, 1836, *B. & C.* who had title, leased to *D.* all their estate and interest, being two-third parts *of all that lot*, within the farm of *N. O.* called *F. R.*, for the term of five years, which before the action brought, came to *E. & G.* by assignment, as to one-half. The metes and bounds in both leases were the same. In an action by *N. O.* for the rent due 1st Nov. 1841, under the lease of June, 1840. *Held:*

LESSOR—LESSEE—LEASE—*Continued.*

1st. That the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to the quarry, as it was not opened at the date of that lease.

2d. That this case is not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil; that of 1840 a lease or license to quarry stone.

3d. If a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land, it shall be intended that his interest is as general as his lease.

4th. Making of new mines is waste, unless the lease is of all mines on the land.

5th. A declaration in a lease dated in 1840, that a quarry "had been recently, or a short time ago, possessed and worked by *W.*" cannot be understood as meaning that the quarry was opened four years previously. *Owings & Griffith vs. Emery & Gault*, 260.

2. A condition in a lease, that, upon neglect of the lessee to pay the rent, or any other failure to perform on his part, the lease shall cease and determine, does not render the lease absolutely void, upon the default in performing the condition, but voidable at the election of the lessor; if he elect to waive the forfeiture, the lessee is bound, as though there had been no breach of condition. *Western Bank vs. Kyle*, 343.

LEX LOCI CONTRACTUS.

See CONTRACT, 8.

LIEN.

1. Where the debt due a bank, which, by its charter, is not bound to permit a transfer of its debtor's stock, until his debts are paid, is barred by limitations at law, it does not lose its lien on the stock. The debt is not extinguished, though its remedy may be barred, and the lien follows the debt. *Farmers Bank of Maryland vs. Iglehart*, 50.

2. If the debt were extinguished, the lien would be lost. *Ib.*

See MECHANICS LIEN.

LIMITATION OF ACTIONS.

1. Where a claim would be barred by the statute of limitations, but for its revival by a subsequent promise to pay, it is not necessary to declare upon the new promise. Its effect is to revive the old, original, cause of action, by removing the statutory bar. It is not material whether the new promise be absolute or conditional. It is a matter of evidence, not of pleading. If conditional, it must appear to have been performed. *Guy vs. Tams*, 82.

2. Where a debtor promises that, if allowed a little time, he would pay all his debts, and the creditor forbore to sue for two years, that is sufficient performance. *Ib.*

3. Whether a new promise, made by a debtor within the time of limitations, applies to the original debt, is a fact for the jury. *Ib.*

4. Before the court can grant a prayer of the defendant—that the evidence offered by the plaintiff does not remove the bar of the statute of limita-

LIMITATION OF ACTIONS—*Continued.*

tions—it must assume the truth of every fact, in support of the plaintiff's claim, which the jury, under the testimony, are competent to find. *Ib.*

5. To remove the bar of the act of limitations, it is not necessary that the creditor, at the time of a new promise, should exhibit the evidence of his claim, or state the precise nature or amount thereof. These are facts for the jury, who must find to what debt or claim the new promise related. If the plaintiff shows but a single indebtedness, it may apply to that; and then, if the debtor alleges a different debt, the *onus* of proving it rests on him. *Ib.*

6. A suit in Chancery abated in 1838, by the death of the defendant. The bill of revivor was not filed until 1843, and to account for the delay, it was alleged and proved that the original papers were lost or mislaid in the Chancery office, from July, 1838, to September, 1843; that frequent searches were made for them without effect, by the register and solicitor of the complainants, and that the bill of revivor was filed as soon as they were found. *Held,*

That the plea of limitations, founded upon this lapse of time, would not, under these circumstances, bar the revival of the suit, even if under ordinary circumstances, such a defence would in equity be available. *Steuart vs. Carr et al*, 430.

7. A decree of the Court of Chancery upon a creditor's bill, finally and conclusively establishes the claim of the complainant creditor, and the insufficiency of the personal estate to pay the same, and prevents the running of limitations against the claim, as a simple contract debt. *Griffith & Keys vs. Reigart and wife*, 445.

8. Interest will not be chargeable against an incorporation on dividends declared, nor will limitations run until demand made. *State vs. Balt. and Ohio R. R. Co.* 363.

LOCATIONS.

See EJECTMENT.

MANUMISSION.

See NEGROES AND SLAVES.

MARSHALLING OF ASSETS.

1. If a creditor having two funds, to which he may resort for the payment of his debt, pursue in equity the fund to which only, another creditor has the right to resort; or if, under the like circumstances, he proceed to prove his debt under a commission of bankruptcy, equity will compel him to seek payment out of that fund, to which such other creditor had no right to resort. *Cornish vs. Willson*, 299.

2. But if one of the funds be *legal* assets, and the other equitable, and the creditor is pursuing the *legal* assets, equity will not strip him of his legal rights, marshal the assets, and oblige such creditor to seek payment out of the *equitable* assets. *Ib.*

MAXIMS AND GENERAL RULES OF LAW.

1. Chancery will ratify an act when done, which upon a previous application, would have been ordered. *Cunningham et al vs. Schley et al.* 208.

MAYOR AND CITY COUNCIL OF BALTIMORE.

1. The legislature, by the acts of 1817, ch. 148, and 1838, ch. 226, conferred certain powers upon the corporate authorities of the city of *Baltimore*, in relation to the opening and widening of streets in said city. *Held*, That it is not essential to the validity of an ordinance of said corporation, executing the powers thus conferred, that it should state or indicate the act in execution of which it was passed. *Methodist Prot. Church vs. Mayor and C. C. of Baltimore*, 391.
2. If no power be stated as its basis, the ordinance will be regarded as emanating from that which would have warranted its passage; and if two such powers exist, it may be imputed to either, in conformity to which, its provisions show it to have been adopted. *Ib.*
3. The power to determine whether or not the public welfare and convenience require the widening of any particular street, is, by the act of 1838, ch. 226, vested *exclusively* in the *Mayor and City Council*, and whether their judgment be right or wrong, is no subject for revision or correction in a court of equity. *Ib.*
4. When notice to all persons interested in the opening or widening of any street, has been duly given by publication, as required by the act of 1838, ignorance thereof, in any party, can afford him no ground for relief, either in equity, or by appeal to the City Court. The law imputes notice, and will not admit testimony to disprove it *Ib.*

MECHANICS LIEN.

1. No mechanic, in virtue of the act of 1838, has a lien on the house which he has built or repaired, unless he has *filed* in the office of the Clerk of *Baltimore* County Court, a statement of his demand, and in that statement has given, not only the *sum due*, but also the *nature* and *kind* of work done, and the *kind* and *amount* of materials furnished, and the *time* when the work was done and materials furnished. *Carson vs. White*, 17.
2. To obtain such a lien, the statement *filed* must state the particulars of his demand, the items, whereby all who may be interested can ascertain not only the amount demanded, but the correctness and reasonableness of the demand itself. *Ib.*
3. These statements, when filed, must be explicit and comprehensive, to protect strangers to the contract, who may have other contracts relating to the same property or liens thereon, from fraud, and may be required by the party at whose request the work is performed. *Ib.*

MINES AND QUARRIES.

See CONTRACT, 5, 6, 7, 9.

MISTAKE.

See CONTRACT, 3.

MORTGAGOR AND MORTGAGEE.

1. The mortgagor can by no acknowledgment subsequent to the mortgage, prejudice the interest of the mortgagee; and hence the admission in this case ought not to have been received. *Carson vs. White*, 17.

MUNICIPAL CORPORATION.

See MAYOR AND C. C. OF BALTIMORE.

NAVIGATION—RIGHT OF.

See EJECTMENT, 39.

NEGROES AND SLAVES.

1. Upon the trial of a petition for freedom, the petitioner offered in evidence the will of his master—proof of his identity, and his right to freedom, according to the terms of the will. The defendant then proved, that the executors took upon themselves the duty of administration; copies of their letters and bond; inventory of the personal estate, including the slaves; debts due the deceased; several administration accounts showing ultimately an over-payment by the executors, the negroes being still undisposed of, and charged to them at the appraisement. The defendant further proved an order of the *Orphans Court* directing a sale of the balance of the testator's personal estate, and an account of sales of negroes returned, including the petitioner, who objected to the admissibility in evidence, of the accounts of the executor, the order of sale of the *Orphans Court*, and return of sales by the executors, which objection was overruled. This was affirmed upon appeal. *Cornish vs. Willson*, 299.
2. That a petitioner for freedom is the same person mentioned in the will of a testator, declaring him free at a certain period, that he was the property of the testator at the time of his death, under the age of forty-five at the period specified for his manumission, able to gain a sufficient maintenance, will not authorize the court to instruct the jury that he is entitled to freedom where an insufficiency of personal assets to pay creditors appears, there being no evidence of the value of the testator's real estate—no means by which the jury could find its value—nor any charge upon the real estate of the testator to pay debts, either upon the true construction of the act of 1796, ch. 67, or the will of the testator—nor jurisdiction to enforce a charge upon the realty for the payment of debts. *Ib.*
3. An order of the *Orphans Court* to sell the balance of a testator's personal estate, which included negroes, it being necessary for the payment of debts, does not restrict the sale of manumitted slaves to terms for years. *Ib.*
4. The terms in a will, "and after my debts and funeral charges are paid, I devise and bequeath," in legal effect at common law, charge the real estate of a testator with the payment of debts, in the event of there *not* being a sufficiency of personal estate to pay them, without a resort to slaves manumitted by the will. *Ib.*
5. But in Maryland, since the act of 1785, ch. 72, the insertion of those words in a will are immaterial and inoperative; that act renders the real estate in aid of the insufficient personalty, equally liable for the payment of debts, whether those words be contained in the will or not, or whether the deceased died testate or intestate. They are now of almost unmeaning form, and *rarely* of any import. *Ib.*
6. The furnishing slaves manumitted, with a place of residence on the testator's property, and giving some of them annuities by the will, does not conclusively demonstrate the right to freedom in *Maryland*.

NEGROES AND SLAVES—*Continued.*

Neither is the fact, that the manumitting terms are in strict conformity with our act, conclusive of the right to freedom. *Ib.*

7. By the act of 1752, ch. 1, the power of manumitting slaves by last will was taken away; the prohibition continued until a few years before the act of 1796, ch. 67, which latter act restored the right permanently. *Ib.*

8. A manumitting clause in a will must be construed in connection with the acts of Assembly. *Ib.*

9. Negroes, by will declared to be free from the death of the testator, or at any future time, are as regularly taken possession of, and held in bondage by the executor, and appraised at their full value, as slaves for life, and returned in the inventory as part of the property of the deceased, as they would be, if no clause of manumission had been inserted in the will. *Ib.*

10. If a petition for freedom were filed by such manumitted slaves, no court in *Maryland* would award their freedom—and thus release the executor—until the time had elapsed within which the creditors were warned to bring in their claims, and the executor was required to settle an account of his administration with the Orphans court; nor then, unless the court are not perfectly satisfied that the liberation of the manumitted slaves can work no prejudice to creditors. *Ib.*

11. The design of the legislature in declaring in the act of 1796, that manumission might be made to take effect at the death of a testator, or at any other period limited in his will, was not to indicate any priority in regard to such manumission, but to put an end to a doubt which then prevailed, whether a deed or will could give freedom to take effect in futuro. *Ib.*

12. If a testator by his will manumit his slaves, without naming any time at which they are to be free, they are entitled to freedom at the same time with those declared to be free at testator's death, and the same inferences and presumptions in their favor. *Ib.*

13. The act of 1796, ch. 67, was to restore a power taken away by the act of 1752, ch. 1, and confer on a testator the same power to give by last will and testament the slave or his services, to the slave himself, that he previously enjoyed of making such a bequest to any other person. *Ib.*

14. In the event of a deficiency of the testator's assets for the payment of his debts, the executor, *under the direction of the Orphans court*, may if the creditors are willing to delay the payment of their claims, *hire out* the manumitted slaves, until the *hire of each*, as a specific legatee, shall raise his proportionate contribution towards the payment of debts; or he may *sell* the manumitted slaves for such length of time as shall be necessary to raise the amount of their respective contributions; or in the event of its being necessary for that purpose, he may sell the manumitted slaves as slaves for life. *Ib.*

15. Manumitted slaves are the proper parties, complainants, to proceed in equity to enforce a charge on lands for the payment of creditors, and seek a sale of real estate—the proceeds of which should be applied to their exoneration. Equity, however, will not decree freedom. *Ib.*

NEGROES AND SLAVES—*Continued.*

16. The manumitted slave, then, by the executor's assent to the legacy of freedom, or by petition in a court of law, where the rights of creditor cannot interpose any barrier, may have his freedom secured by judgment. *Ib.*
17. The bequest of freedom to a slave, is a legacy within the meaning and operation of the act of 1844, ch. 237, and therefore subject to the tax imposed on legacies by that act. *State vs. Dorsey, Ex'r of Worthington*, 388.

NOTICE.

See ASSIGNMENT, 3.
MAYOR AND C. C. OF BALTIMORE, 4.
PRACTICE, 25.
PRACTICE IN CHANCERY, 11.

NUDUM PACTUM.

See CONTRACT, 10.

NUISANCE.

1. When a plaintiff may, by the exercise of ordinary care and diligence, avoid an injury arising from a nuisance, erected or maintained upon a public street in a populous city by the defendant, and did not exercise such care and diligence, he cannot recover damages for a personal injury arising from such nuisance. Under such circumstances, he must bear the consequences of his own folly. *Irwin vs. Sprigg*, 200.
2. An area intended to furnish light to the basement of the defendant's house, opened in the pavement of a public street, in a populous city, is a public nuisance of a dangerous character, which the owner of the house, when it was erected, and all subsequent purchasers, are bound to render secure. It is an act of wrongful negligence not to protect it from persons passing through such public street, and renders the possessor of the house liable for the accidents which may result therefrom. *Ib.*
3. It is no defence in such a case that the area was open, or had been opened, before the defendant became the possessor of the property; when he took possession, he was bound to guard against the danger to which the public had been before exposed. *Ib.*

ORPHANS COURT.

1. In the event of a deficiency of the testator's assets for the payment of his debts, the executor, *under the direction of the Orphans court*, may if the creditors are willing to delay the payment of their claims, *hire out* the manumitted slaves, until the *hire of each*, as a specific legatee, shall raise his proportionate contribution towards the payment of debts; or he may *sell* the manumitted slaves for such length of time as shall be necessary to raise the amount of their respective contributions; or in the event of its being necessary for that purpose, he may sell the manumitted slaves as slaves for life. *Cornish vs. Willson*, 299.
2. Such proceedings of the Orphans court being *ex parte*, may be afterwards re-investigated, either at law, or in equity. *Ib.*

ORPHANS COURT—*Continued.*

3. An order of the *Orphans Court* to sell the balance of a testator's personal estate, which included negroes, it being necessary for the payment of debts, does not restrict the sale of manumitted slaves to terms for years. *Ib.*

4. The will of *W. H.* executed on the 16th May, 1838, was admitted to probate on the 18th September of the same year. The appellees, the executors of this will, afterwards, on the 20th November following, offered for probate a deed, duly executed and recorded, dated the 8th September, 1832, by which their testator conveyed to the appellees, his two sons, "one-half of all the personal estate of which he might die possessed." In June, 1839, after process of citation to all parties interested, the Orphans court admitted this deed to record, as a testamentary paper. On the 20th May, 1845, the appellant and his then wife, one of the heirs and devisees of the testator, filed in said Orphans court a petition, praying for certain reasons therein stated, that the probate of said deed might be revoked and vacated. Upon appeal from the order of said court dismissing this petition, it was *Held*, that this deed was not a testamentary paper, and the order of the Orphans court directing it to be recorded as such, was null and void. *Robey vs. Hannon*, 463.

See EXECUTORS AND ADMINISTRATORS.
TRUSTS—TRUSTEE, AND C. Q. TRUST.

PARTNERSHIP—PARTNERS.

1. The appellant and appellee entered into an agreement in writing, by which the former agreed to employ the latter as salesman and clerk in his store, and allow him for his services, one-fourth of the net profits of the business, and which further declared "that thereby the said" appellee "is not made a partner in trade of the said" appellant, "but that the allowance of one-fourth of the net profits, after deducting expenses," &c. "is a compensation for the services of the" appellee "in lieu of clerk hire." *Held*,

   That this agreement is conclusive, to show that the parties were not partners, *inter se*, and however the appellee may be held liable as to third persons, he has none of the rights and equities of an actual partner,—and therefore, has no more right to call for the interposition of a court of equity, on the ground of lien, than any other creditor of the appellant. *Kerr vs. Potter*, 404.

2. If he performed acts, or stood by and saw others perform them, which would render him liable to the creditors of the concern, the credit given was voluntary, and gave him no other equity than would result to any other person who should become responsible for the appellant's indebtedness. *Ib.*

3. There being here no controversy between creditors, but simply whether the appellee was the actual partner of the appellant, this case is not analogous to the case of *ex parte Digby* and *ex parte Buckston*, in 38 *Eng. C. L. Rep.* 495. *Ib.*

PATENT.

See EJECTMENT.

PERSONAL ESTATE.

1. The charter of the *Baltimore and Ohio R. R. Co.*—act of 1826, ch. 123, sec. 18—declares that the shares of the capital stock of that Company shall be considered *personal* estate, and exempt from the imposition of any tax or burthen. *Mayor and C. C. of Baltimore vs. Baltimore and Ohio R. R. Company*, 288.
2. The personal estate is the natural and primary fund for the payment of debts and legacies; and even where they are expressly charged upon the real estate descending or devised, the real estate is only to be resorted to as an auxiliary fund, after the personalty has been exhausted. *Cornish vs. Willson*, 299.
3. All debts and legacies are payable out of the personal estate, and are only chargeable upon real estate by the will, either by its express terms or necessary implication from its language. *Ib.*

PLEAS AND PLEADINGS.

1. Where the court is called upon to instruct the jury as to the law arising on the facts, this impliedly assumes the correctness of the pleadings. *Guy vs. Tams*, 82.

See PRACTICE.

PRACTICE.

1. The plaintiffs, on the 21st September, 1844, filed proceedings in *Baltimore* County Court, under the act of 1838, ch. 205, to establish a lien for work and labor done upon a house in the city of *Baltimore*, at the request of J. The claim filed showed that the work had been done between May and September, 1844, and the proof *offered* in support of it was the written admission of J. made in September, 1844, that the claim was correct. It appeared that in July, 1844, he had mortgaged this property to W. *Held:* That a mortgagee, in such a case, claiming the property sought to be affected by the plaintiffs, may appear to and defend the action. This proceeding was in *rem*. *Carson vs. White*, 17.
2. The trustees of the debtor-mortgagor, under the insolvent laws, might have appeared to defend the equity of redemption. *Ib.*
3. Our attachment laws do not expressly authorize a claimant of property to appear to an attachment; yet claimants are permitted to interpose their claim against a judgment of condemnation. *Ib.*
4. No mechanic, in virtue of the act of 1838, has a lien on the house which he has built or repaired, unless he has *filed* in the office of the Clerk of *Baltimore* County Court, a statement of his demand, and in that statement has given, not only the *sum due*, but also the *nature* and *kind* of work done, and the *kind* and *amount* of materials furnished, and the *time* when the work was done and materials furnished. *Ib.*
5. To obtain such a lien, the statement *filed* must state the particulars of his demand, the items, whereby all who may be interested can ascertain not only the amount demanded, but the correctness and reasonableness of the demand itself. *Ib.*

PRACTICE—*Continued.*

6. These statements, when filed, must be explicit and comprehensive, to protect strangers to the contract, who may have other contracts relating to the same property or liens thereon, from fraud, and may be required by the party at whose request the work is performed. *Ib.*
7. The defendant, with others, signed an instrument of writing, promising to pay the *President and Managers of the S. and G. S. Rail-road Co.* the sum of $50 for every share of stock set opposite to their respective names, in such manner, &c. as should be determined by the said *P. and M.*, pursuant to an act of the General Assembly of *Pennsylvania.* A verdict was taken for the plaintiff for the value of shares subscribed for by the defendant, subject to the opinion of the Court, upon a statement of facts, with an agreement that the court might make such inferences from the facts, as a jury might. At the time of the subscription it was admitted by the statement, that the committee, who obtained it, represented to the defendant that *T. W. Canal stock* would be taken at par for any subscriptions to the *Rail-road Co.* The defendants resided in *Maryland*, and were ready to pay in Canal stock. *Held*, that an action for money had and received could not be maintained. *Swatara R. R. Co. vs. Brune*, 41.
8. A party cannot agree upon a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, as that it was not in writing. *Ib.*
9. A plaintiff cannot recover in *assumpsit* against his own representation, upon a promise, the inducement to make which was founded upon such representation. *Ib.*
10. When a fact is admitted, of which written evidence alone was competent, and the admission is silent as to the nature of the proof, the court will not infer that it was verbal, nor that it was not within some one of the exceptions to the general rule. *Ib.*
11. A plaintiff ought not to disavow the act of his agent, in an action brought to enforce the contract made by such agent. *Ib.*
12. Where the defendant's claim was $2,436 10, and his agent intending to pay that sum, erroneously and unconsciously paid $3,306 10, which payment was made up of $1,006 in small notes illegally issued by the plaintiff, and $2,300 10 in current money, the defendant received the whole as money, and upon immediate demand, refused to return the small notes, or the over payment. In an action for money had and received, the plaintiff may show the error; the defendant cannot defend himself upon the ground that the small notes were illegally issued. *Baltimore & Susquehanna R. R. Co. vs. Faunce & Passmore*, 68.
13. In an action for money had and received, any thing received by the defendant as money, will entitle the plaintiff to recover; as a bond, a note, a credit in account, land received and acknowledged as money, and a mixed, erroneous, payment of legal and illegal notes—there being circumstances to show that the defendant received money for the illegal notes. *Ib.*
14. Where a claim would be barred by the statute of limitations, but for its revival by a subsequent promise to pay, it is not necessary to declare

PRACTICE—*Continued*

upon the new promise. Its effect is to revive the old, original, cause of action, by removing the statutory bar. It is not material whether the new promise be absolute or conditional. It is a matter of evidence, not of pleading. If conditional, it must appear to have been performed. *Guy vs. Tams*, 82.

15. Whether a new promise, made by a debtor within the time of limitations, applies to the original debt, is a fact for the jury. *Ib.*

16. Before the court can grant a prayer of the defendant—that the evidence offered by the plaintiff does not remove the bar of the statute of limitations—it must assume the truth of every fact, in support of the plaintiff's claim, which the jury, under the testimony, are competent to find. *Ib.*

17. To remove the bar of the act of limitations, it is not necessary that the creditor, at the time of a new promise, should exhibit the evidence of his claim, or state the precise nature or amount thereof. These are facts for the jury, who must find to what debt or claim the new promise related. If the plaintiff shows but a single indebtedness, it may apply to that; and then, if the debtor alleges a different debt, the *onus* of proving it rests on him. *Ib.*

18. Where the court is called upon to instruct the jury as to the law arising on the facts, this impliedly assumes the correctness of the pleadings. *Ib.*

19. In an action of covenant, the defendant pleaded *non infregit*, &c. with liberty to give in evidence any matter he might have pleaded; *provided*, he gave notice to the plaintiff of the matter of such evidence within, &c.—not having given the notice, the cause stood under the plea filed. *Held:* That in such action under that plea, a parol agreement by which the time of performance of the covenant was enlarged, is not admissible in evidence. *Franklin Fire Insurance Co. vs. Hamill*, 87.

20. A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing to show the loss less than that claimed, would be admissible. The doctrine relative to mitigation of damages has no application to such a case. *Ib.*

21. In an action of covenant, where the plaintiff was not entitled to recover, unless he proved that the property insured was destroyed by fire; that notice of the loss, and an estimate of damage sustained, were furnished the underwriter, according to the terms of the policy, it is error in the County Court to instruct the jury, that the plaintiff is entitled to recover, in such a form as to take from them the consideration of the fact, when the fire occurred, and assume the day, or that notice of the disaster was forthwith communicated, and a particular account of loss furnished to the company. *Ib.*

22. *V. & D.* sued *S.*, and declared against him as maker of a note, and upon the common counts. The note was signed by *N. & M.*, payable to the plaintiffs, or order, and across the back of it, *S.* had written his signature in blank. The plaintiffs proved that the signature, N.

PRACTICE—*Continued.*

& M., was written by *S.*, and that he was a partner of that firm. The note was given for a balance due by *N. & M.* to the plaintiffs, upon their request, who had asked for the note endorsed by *S.* The defendant proved that he was not the partner of *N. & M.*, but their agent, and the plaintiffs knew it. The plaintiffs prayed the County Court to instruct the jury, that if they believe that the name of *S.* was written by him on the back of the note at the time it was signed by *N. & M.*, or shortly afterwards—that then the defendant, even if he were not a member of the firm of *N. & M.* is liable in this action, and the plaintiffs entitled to recover, which was granted, and affirmed upon appeal. *Sullivan vs. Violett & Dempsey*, 181.

23. The defendant *S.* then prayed for an instruction, that if the jury should believe that the plaintiffs solicited the note from *N. & M.*, to be endorsed by *S.*, and that he was authorized by *N. & M.* to sign their names to such note, and after writing his own name on the back of said note, to send the same to the plaintiffs; and that *S.* did sign the name of *N. & M.* to said note, and wrote his name on the back of the same as endorser, as requested by the plaintiffs,—that then the jury cannot find for the plaintiffs, as the defendant's liability is not that of a maker of said note. The County Court refused said prayer, which was affirmed upon appeal. *Ib.*

24. The construction of written contracts is to be declared by the court, and not submitted to the finding of the jury. *Emery & Gault vs. Owings*, 191.

25. An unaccepted draft, drawn by a *third* party upon a *fourth*, was endorsed by a debtor to his creditor on account of a precedent debt;—acceptance was refused, and notice given to the drawer by the holder—but notice was not given to the debtor endorser for some months after such refusal. In an action by the creditor against the debtor to recover his precedent debt, the defendant cannot defeat the action to the amount of the draft, by insisting that the holder should have sued the drawee, who had funds of the drawer at the time of the presentation of the draft—the drawer being sued by the creditor, who still retained the draft. *Brooks vs. Elgin*, 254.

26. Refusal to accept or pay a draft, established by oral proof, is a question of fact; whether notice of such refusal was given within a reasonable time, is a question of law. *Ib.*

27. Whether an assignee of a draft, delivered and received on account of a precedent debt, has or has not used due diligence in endeavoring to recover the sum assigned to him, from parties on the draft liable to the assignor, is a question of law. *Ib.*

28. That a petitioner for freedom is the same person mentioned in the will of a testator, declaring him free at a certain period, that he was the property of the testator at the time of his death, under the age of forty-five at the period specified for his manumission, able to gain a sufficient maintenance, will not authorize the court to instruct the jury that he is entitled to freedom where an insufficiency of personal assets to pay

PRACTICE—*Continued.*

creditors appears, there being no evidence of the value of the testator's real estate—no means by which the jury could find its value—nor any charge upon the real estate of the testator to pay debts, either upon the true construction of the act of 1796, ch. 67, or the will of the testator—nor jurisdiction to enforce a charge upon the realty for the payment of debts. *Cornish vs. Willson*, 299.

29. Upon a petition for freedom in a court of law, no evidence of the value of real estate can legally be submitted to the jury, or form a subject for its determination. *Ib.*

30. On whom the burden of proof rests of proving the amount of debts—a sufficiency or insufficiency of assets, upon a petition for freedom.—*Qr. Ib.*

31. In a court of law, equitable assets has no legal entity—are of no value—not recognized by it, and of them no cognizance can be taken. *Ib.*

32. Arrears of rent due a landlord, of which the sheriff had notice by a due warrant of distress, before sale, cannot be retained for the use of such landlord, by such sheriff, out of the proceeds of the goods of a stranger levied upon, while, on the demised premises, under a writ of attachment, to compel an appearance at law, the same goods having been duly condemned, and afterwards sold by *fieri facias*, under the judgment of condemnation. *Fisher et al vs. Johnson*, 354.

See EJECTMENT—for practice in that action.

PRACTICE IN COURT OF APPEALS AND CHANCERY.

PRACTICE IN CHANCERY.

1. After decree for a sale of real property, a sale reported by the trustee, and exceptions filed to its ratification still pending, a party interested in the proceeds of sale applied to the Chancellor for an injunction, on the ground that the reported purchaser, without the sanction of the court or those interested, had assumed the power to rent the property—and that it was about to be used by his lessee. The object of the injunction was to restrain such use. *Held*, that as it was not alleged that the property was subject to waste in the hands of the purchaser, or his lessee, or that its preservation was endangered by the disposition which the reported purchaser had made of it—the injunction should not have been granted. *Wagner & Marshall vs. Cohen*, 97.

2. A contract of sale, made between the court as the vendor of property, through the agency of a trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court. *Ib.*

3. A party interested in the proceeds of property decreed to be sold, although his right in the property is merged in the decree, retains such an interest as will enable him to apply to the court, which rendered the decree, to protect and preserve the estate from injury and waste. *Ib.*

4. A guardian executed a conveyance of negroes, by way of indemnity, to a security in his bond, which security bequeathed them to the wards, according to their respective shares and interests in a legacy made to them by their grandmother, and as a full equivalent for the money

PRACTICE IN CHANCERY—*Continued.*

they were entitled to receive from her. Upon a bill to compel the guardian to account, and for a partition of the negroes, the complainants were held bound to prove the number of wards among whom the property was to be divided, or interested in the legacy. *Hilleary vs. Hurdle*, 105.

5. A complainant is not confined to the specific relief asked for in his bill—but he cannot obtain relief in opposition to its allegations. *Ib.*
6. A party cannot in his bill claim of his guardian, and at final hearing insist that the answers of other defendants entitle him to abandon the claim against the guardian, and prefer the same claim against co-legatees. To do this, he must amend his bill. *Ib.*
7. In a contest between an executor and a specific legatee, it appeared that the former, before the settlement of his accounts, had delivered to the latter the personal property, devised to her upon an agreement on her part to refund, if it should turn out that there was a deficiency of other assets to pay debts. The personal assets and some real estate, devised to be sold for payment of debts, proved insufficient, when the legatee was decreed to refund. As between such parties, the court refused to entertain the question—whether the testator intended to charge other portions of his real estate, which he had also devised to other parties, with the payment of his debts. *Buchanan vs. Pue*, 112.
8. If it were the intention of the testator to exempt his personal estate from the payment of debts, the specific legatee of such estate might be subrogated to the rights of creditors, and claim to be reimbursed by the devisees of the realty. A bill for that object might still be filed by the legatee, when the interpretation of the will, as to that question, would be determined. *Ib.*
9. It is not necessary for a trustee, in his published notice of sale under a decree, to state the names of the parties to the suit in which the decree was passed; nor the several deeds creating incumbrances on the property offered for sale. *Cunningham et al vs. Schley et al*, 207.
10. A decree directed that the real estate of *J.* deceased, in the proceedings mentioned, or so much as may be necessary to pay his debts, be sold; and although it does not say in terms, that the title of the parties to the suit should be sold, still a sale under the decree would pass such title. *Ib.*
11. A notice of sale, which states that by virtue of a decree of the Court of Chancery, there will be sold certain real estate, naming the tracts, giving their locality, of which *J.* died seized and possessed, is a notice that there must be parties to the decree,—and in the absence of evidence, that competition in the purchase was prevented by the character of the notice, or that the sale was, in any respect, prejudiced thereby: a sale under such notice should not be vacated. *Ib.*
12. A defendant in a cause, under such a decree, cannot object that the trustee did not, in fact, sell the interest of the parties to the suit, but only of one of them. Such an objection might come from a purchaser, who is alone injured by it. *Ib.*
13. Where a defendant, whose title is decreed to be sold, knows of any fact

PRACTICE IN CHANCERY—*Continued.*

which would disperse a cloud on the title decreed to be sold, and omits to communicate it to the trustee in due time, it does not become him, when a sale has been made, to interpose it as an objection to the ratification of sale against purchasers. *Ib.*

14. When a sale is objected to on the ground of inadequacy of price, which may be traced to doubts about the title, it becomes material to inquire, whether the trustee might not, by reasonable efforts, have removed the cloud. *Ib.*

15. Where, from the nature of the doubt, no diligence on the part of the trustee could remove it, he may proceed to a sale, and the parties may refer its solution to the judgment of the court. *Ib.*

16. Where a sale reported was of a private sale, made for a much larger sum than could be obtained at an offer at public sale, duly made by a trustee, inadequacy of price is no objection to the private sale. *Ib.*

17. An event which happens subsequent to a reported sale, and which, in the opinion of many persons, has enhanced the value of the property sold, ought not to affect such reported sale. *Ib.*

18. In *Andrews vs. Scotton*, 2 *Bland*, 643, it was decided, "that if a trustee directed to sell by decree at a public sale, sell, at private sale, the sale will be confirmed, if satisfactory reasons are given for so doing, and *no objection is made.*" These latter words mean *objections of sufficient force*, to outweigh the reasons given by the trustee for deviating from the terms of the decree. *Ib.*

19. Where a trustee did not undertake to sell at private sale until a fruitless effort had been made at public sale, according to the terms of the decree, and even after such failure kept the property in the market by advertisements offering it at private sale, and procured a greater price at private than he had been offered at public sale—the court will not consider his conduct a substantial deviation from the decree, but only one offered from necessity. *Ib.*

20. Chancery will ratify an act when done, which upon a previous application, would have been ordered. *Ib.*

21. Whilst the Chancellor would consider it his duty to vacate sales made by officers of his appointment, under the influence of error, fraud, misrepresentation, or injurious mistake, still it would be fatal policy to be astute in finding out objections to them. *Ib.*

22. Where a trustee's bond is not stamped, but was filed and approved by the Chancellor, and the trustee proceeded to make the sale as decreed—this is not a ground for vacating the sale; but the Chancellor, on application, will require the trustee to file a new bond. *Ib.*

23. If a party interested in real property, decreed to be sold by a trustee of the Court of Chancery, should apply to such trustee to know at what sum he intended limiting the sale, and was informed,—and if a few minutes before the sale, the trustee were to inform such party that his limit was several thousand dollars less, and in consequence thereof, the interest of such party had been prejudiced, the court would not ratify a sale at such lesser sum. *Cohen vs. Wagner*, 236.

PRACTICE IN CHANCERY—*Continued.*

24. Where property was offered for sale under a decree on a *Saturday*, the *Sabbath* of a party interested, and who was prevented thereby from making arrangements to purchase the same, and he knew of the day fixed for sale several weeks before it took place, it was his duty to have applied to the trustee to change the day. Omitting to do this, his failure must be regarded as a waiver of all objection to the day of sale as being his *Sabbath*, and he must abide the consequences of his own omission. *Ib.*
25. The practice of opening the biddings upon a Chancery sale upon a mere offering of an advance upon the purchaser's bid, has not been adopted in this State. *Ib.*
26. Mere inadequacy of price in a Chancery sale correctly conducted, is not, of itself, sufficient ground for vacating the sale. *Ib.*
27. A fair sale of property for $13,000, alleged to be well worth $15,000 or $20,000, will be ratified. There was proof, however, in this case that extensive repairs were necessary to place the houses in good condition. *Ib.*
28. A sale made in conformity to the decree will not be set aside, or its ratification refused for mere inadequacy of price, unless the court believe that such inadequacy was the result of fraud, surprise, mistake, or unfairness in the sale. *Ib.*
29. Inadequacy of price is, for the most part, regarded as the inducement to the action of the court, after the establishment of a cause deemed sufficient to warrant its nullifying interposition. *Ib.*
30. Where a stranger called on the trustee of a court about to offer property at public sale, and inquired what was his limit of sale, and was informed from $12,000 to $15,000, and the stranger said he would give $13,000, or find a purchaser at that sum; and the auctioneer, the agent of the trustee, casually heard in a conversation between by-standers, that either *W.* or the trustee, remarked that *W.* would give $13,000 for the property. The auctioneer then said to his clerk, who was in fact conducting the biddings, "*you have a bid of* $13,000"—the purchaser's name not being announced—and the clerk, after crying the property for some time, receiving no advance upon the bid from the company assembled, struck off the property to *W.* who agreed thereto. *Held*, that whether the bid was made by *W.* or by some other person acting for him, was immaterial. It is not necessary or usual to announce the name of the bidder, nor is it necessary to be known. *Ib.*
31. A communication of the trustee's limit as to price, made by him to the auctioneer employed to make a sale, and if he got no bid above that, to strike it off to *W.* is no objection to a sale. It does not prevent any person from bidding a larger amount, and such a course does not make it a private sale—but in form and substance, it is a public sale. *Ib.*
32. Inadequacy of price may be so gross and inordinate as to furnish evidence of fraud or misconduct in a trustee, such as would vitiate his sale. *Ib.*
33. A guardian may be responsible to his ward as bailiff, or guardian before he bonds; but in such a case, the bill should charge an entry on the

PRACTICE IN CHANCERY—*Continued.*

ward's estate, and perception of profits before he bonded. *Magruder and wife vs. Darnall and wife*, 269.

34. But where the bill is framed in reference to his duty as guardian, deriving his authority as such from his appointment, the account should be taken from the date of his bond. *Ib.*

35. When it is claimed to charge a guardian with perception of rents and profits before he bonded, as well as after, and there were no allegations in the bill on the subject of profits before his appointment, that question is not in issue in the cause. *Ib.*

36. So, where a widow administered upon her *first* husband's estate, her *second* husband cannot be made responsible for receipts prior to his marriage, without she is a party to the bill, and those receipts put in issue by proper allegations. *Ib.*

37. The testimony of but one witness is clearly insufficient to overthrow the responsive and positive denials of an answer. *Methodist Prot. Church vs. Mayor and C. C. of Balt.* 391.

38. The auditor allowed the trustees five *per cent.* commission upon certain rents of the trust estate, collected by them in person, and one-half *per cent.* on others, for collecting which, they had previously paid an agent seven and a half *per cent.* and rejected their claim for a solicitor's fee, paid for preparing their answer in this cause. *Held*, that these allowances and this rejection were properly made. *Williams and Prentiss vs. Mosher*, 454.

See COURT OF CHANCERY.

PRACTICE IN THE COURT OF APPEALS.

1. Upon an appeal under the act of 1835, ch. 380, from the granting of an injunction only, this court is confined to the case made by the bill or petition. It does not examine the answer. *Wagner and Marshall vs. Cohen*, 97.

2. The necessity of filing an answer is imposed upon the defendant, as one of the conditions on which his right to appeal depends. The object of the act, in such requisition, was to prevent delay. *Ib.*

3. Where the court reverses the judgment of the County Court for error in instruction as to a question of variation of the compass, and perceives that by no allowance for such variation which the jury could rationally have made, the merits of the controversy could be affected, it will not award a procedendo. *Wilson et al vs. Inloes et al*, 121.

4. The court will not issue a procedendo on reversal of a judgment, where they perceive from written evidence, as a receipt, that the plaintiffs cannot ultimately recover. *Emery & Gault vs. Owings*, 191.

5. The court will not reverse a decree, on the ground of error committed in the mode of averaging proof, when assured, that the whole evidence in the cause fully justified the credits allowed in relation to the subjects affected by such average. *Magruder and wife vs. Darnall and wife*, 269.

6. Where the entire estate in the hands of a guardian is not more than necessary to pay expenses, proper and necessary to be made, and

PRACTICE IN THE COURT OF APPEALS—*Continued.*

which were made, the court will not reverse a decree, to enable them to charge the guardian with a greater sum by way of interest. *Ib.*

7. Where the allowance of that rate of commission exhausted the balance for which the Chancellor decreed, this court reversed the decree, with costs, and dismissed the bill. *Ib.*

PRINCIPAL AND SURETY.

1. Where three parties were responsible as sureties upon a promissory note, and upon a difference arising as to the extent of their several liabilities, it was agreed that the note should be renewed—one being maker, and the two others endorsers; the latter endorser being security for the first. The executor of the maker having paid the note, omitted to present his claim to such last endorser until the estate of the *first* endorser, which was amply sufficient to pay his liability, was settled up; and when no recourse could be had against it.—*Held*, that the latter endorser was discharged. *Dorsey vs. Wayman*, 59.

2. The last endorser on a promissory note, who was the security for a prior endorser, does not lose his claim against his immediate principal, by continuing to endorse renewals of the note, which fell due after his principal's death. *Ib.*

PROCEDENDO.

See PRACTICE IN COURT OF APPEALS.

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PURCHASER.

1. If the purchaser has not assumed the responsibility of protecting the property by taking possession of it, any loss that may be sustained by its injury or deterioration in the interval between the sale and final ratification, falls upon the vendor. Still it gives to the purchaser an inchoate and equitable title which becomes complete by the ratification of the court. *Wagner & Marshall vs. Cohen*, 97.

2. A ratification retroacts, and the purchaser is regarded, by relation, as the owner from the period of sale. He is entitled to the intermediate rents and profits; cannot escape from the sale, because disadvantageous, and is bound to pay interest on the purchase money from its date. *Ib.*

3. Possession obtained by a purchaser from a trustee acting under a decree, though before ratification, is not unlawful. *Ib.*

4. Where a sale under a decree is vacated, the purchaser, having been let into possession by the trustee, and enjoyed the use, is responsible for rents and profits. *Ib.*

See TRUSTEE'S SALES.

RENTS AND PROFITS.

See PURCHASER, 4.

REPLEVIN.

1. The owners and consignors of certain packages of goods took from *S. & Co.* common carriers in the city of *Phila.* a receipt, by which said carriers agreed to forward said goods, directed to the owners at

REPLEVIN—*Continued.*

"*Georgetown, Ky.*" from the former city to *Cumberland*, and there deliver the same to the four-day line agent. Upon the back of this receipt, the consignors afterwards wrote and signed the following endorsement: "*Messrs. Green & Co.* at *Cumberland*, deliver the goods on the within receipt for four-day line to *Duncan, Calhoun & Co.*" and delivered the same to said *D. C. & Co. G. & Co.* to whom this endorsement was directed, resided in *Baltimore*, and were common carriers, and as such, were in the habit of forwarding goods sent by *S. & Co.* from *Phila.* to *Baltimore*, through to *Cumberland*. *Held*,

That the delivery of this receipt, with its endorsement to *D. C. & Co.* by the appellants, and an exhibition thereof by them to *G. & Co.* the appellees, though accompanied by a tender to pay the charges due on said packages, did not give the appellants the right to maintain an action of replevin for the goods. *Duncan, Calhoun & Co. vs. Green & Co.* 478.

REVENUE OF THE STATE.

See TAXES.

SLAVES.

See NEGROES AND SLAVES.

SPECIFIC EXECUTION OF CONTRACTS.

1. *W. & H.* agreed in writing, signed by them, that *W.* had sold to *H.* "all that part of a tract of land, called *R.*, lying adjoining the turnpike road near where *P.* now lives, at, &c.—we having this day settled our other business without including the sale for this land, we make this memorandum to save trouble in case of accident to either of us." *Held:*

That this agreement contained no sufficient description of the land sold; the bounds and quantity are both uncertain and indefinite, and could not be enforced any further than as admitted by *H. Dorsey vs. Wayman*, 59.

STAMP.

See TRUSTEE'S SALES, 13.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTION.

SUBROGATION.

See PRACTICE IN CHANCERY, 8.

SURVEY AND SURVEYOR.

See EJECTMENT.

TAXES.

1. In 3 *Howard's Rep.* 133, *the Supreme Court of the United States* say of a franchise for banking when bought, "the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price." If by this was meant a *special legislative charge or imposition upon the franchise*, the correctness of the principle could not be denied; and if it meant a special tax, *technically speaking*, levied for the support of the government of *Maryland*, it would

WILL AND TESTAMENT—*Continued.*

8. In this case the devise is immediate: those entitled to the devised premises became so entitled as soon as the testator died. The description of the persons to take, is general; and only those who can take at the time of the testator's death, came within the description. *Ib.*
4. This devise comprehended all persons answering the description at the time of testator's death. *Ib.*
5. The owner of the fee on which a stone quarry was situate, having mortgaged and leased the quarry, devised it to his son, and directed "that the rents arising from the quarry be applied to discharge the incumbrances on the same." *Held*, that the rents due at the testator's death passed to the son of the deceased, for the purpose of paying the incumbrances. *Emery & Gault vs. Owings*, 191.
6. That the clause of the will did not separate the rents from the reversion. *Ib.*
7. If the application of the rents had been directed to the payment of the testator's debts, irrespective of the lands out of which they issued, the implication of a devise of the rents to the testator's executor could not have been repelled. *Ib.*
8. A devise of land to be sold by one's executors at a specified sum, and if it will not sell for that, not to be sold, does not constitute a charge on it, or its proceeds, for the payment of debts. *Cornish vs. Willson*, 299.
9. The terms in a will, "and after my debts and funeral charges are paid, I devise and bequeath," in legal effect at common law, charge the real estate of a testator with the payment of debts, in the event of there *not* being a sufficiency of personal estate to pay them, without a resort to slaves manumitted by the will. *Ib.*
10. But in Maryland, since the act of 1785, ch. 72, the insertion of those words in a will are immaterial and inoperative; that act renders the real estate in aid of the insufficient personalty, equally liable for the payment of debts, whether those words be contained in the will or not, or whether the deceased died testate or intestate. They are now of almost unmeaning form, and *rarely* of any import. *Ib.*
11. In the case of *Fenwick vs. Chapman*, 9 *Peters*, 461, if those words do make the debts of the testator *a charge* upon the realty, still it does not follow that it is primarily applicable to their payment. *Ib.*
12. The natural presumption, as to every testator, unless the contrary appears on the face of the will, is, that *all* his devises, bequests and directions, shall be gratified and conformed to. He assumes himself to be in a condition to make them; none have any preference, except by his intent. He is presumed to know the established principles of construction. *Ib.*
13. All debts and legacies are payable out of personal estate, and are only chargeable upon real estate by the will, either by its express terms, or necessary implication from its language. *Ib.*

WILL AND TESTAMENT—*Continued.*

14. An intention on the part of a testator to charge his real estate with the payment of debts, and exonerate specific legacies from that liability, does not result from the nature of manumission granted by his will. *Ib.*
15. Unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts, it shall be taken subject to them. *Ib.*

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